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ADDRESS DELIVERED BY THE ATTORNEY-GENERAL TO FRENCH JUDGES AND LAWYERS

It has been suggested that I should talk to you about the administration of justice in England. I should not have found that an easy task before any audience; I am especially diffident about undertaking it before so learned and distinguished a body as this one. For I am a mere practising lawyer, and although at one time I did teach law in one of our English Universities I was singularly ill qualified to do so, for I had no background of academic learning before I became a practising barrister—and I have had no time to acquire one since. My training has been from day to day and year to year in the ordinary and humdrum practice of the Courts.

Yet in a way I suppose that that is one of the typical and distinguishing features which marks the English lawyer, and you will find that it has to some extent affected the whole development of our law. As often as not the English lawyer has had little or no academic training. At the University he may never have studied law at all. And although lectures on law are provided for students at the Inns of Court of which they become members if they are going to be barristers or at the Law Society if they are becoming solicitors, they are of an essentially practical character—and so far as barrister students are concerned no student is compelled to attend them. He has, it is true, to get through his examinations, but that can be done without any undue expenditure of intellectual effort, and certainly without any great knowledge of the theory of law. The English lawyer's real education in the law is acquired in the course of his actual experience in dealing with concrete cases.

That fact explains two notable things about English law and English lawyers—the absence of any real underlying science of jurisprudence and the suspicion with which English lawyers commonly regard the legal theorists. English law has never really attempted to work out general principles, to establish new legal concepts giving new expression to the idea

of justice. It remains largely based on ancient and sometimes primitive Teutonic and Norman concepts, although practical judicial interpretation has often transformed their application into something far removed from their traditional origin. But until comparatively recent years the process of keeping the law in touch with the changing needs of society and the development and refinement of the sense of justice has been essentially a practical one : the academicians and the professors have played little part in it. Indeed, in law, as in other matters, Englishmen have little interest in theory; they are sometimes almost afraid of it. The man in the street is rather inclined to associate legal and political theory with German philosophy —and German philosophy with German political action. I well remember when I was a student I had to make a speech lauding the virtues of a great Lord Chancellor, Lord Birkenhead, at that time the supreme figure in our judicial hierarchy. Thinking to flatter him I described him in my speech as a great Jurist. ' Jurist ? '—he said in his reply—' I have never been so insulted in my life '. And a distinguished Englishman, who was a novelist as well as a barrister and a statesman, John Buchan, who afterwards became Lord Tweedsmuir, hits the English attitude off extremely well in one of his novels.

> ' " I don't like ", said Mr. Jones, " the folk that call themselves Jurists."
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> ' " No more do I ", said Christopher Normand from the depths of his armchair. " They usually come from Guatemala or Peru. They start by talking about Solon and Lycurgus, and they end by being squared ".'

Since that was written we have learned to respect those two countries and the distinguished lawyers who have come from them. But we still retain our shyness of the legal theorist.

Yet in spite of its apparent lack of any theoretical foundation, in spite of its want of form and system, English law has succeeded in dividing with Roman law the Empire of almost the whole civilised world. Only two considerable masses of population stand outside the influence of one or the other : the Musulman East, which obeys the sacred law of Islam, and China, which has a body of customary law of antiquity but of her own. It is hard to estimate the total number of people who live under the English common law, or systems derived from it, for one does not know whether to include the semi-savage natives of such regions as, for instance, Uganda or Fiji. But the number of civilised people living under rules which have come more or less directly from the English law must be of the

order of a hundred and fifty million, not including the natives of India. That is, perhaps, not so large a number as those living, as you do, under some modern form of Roman law. But it is large enough to make some understanding of English law worth while, for what constituted in the seventeenth century the law of a few millions is today governing the lives of hundreds of millions of men.

What, then, are the foundations and the basis upon which the English administration of justice, no longer insular but carried to and developed in parts far beyond the seas, under no sort of British sovereignty, may be said to be based? What, indeed, is the Englishman's notion of justice itself? It is difficult to say. The Englishman has, I think, no clear or static conception of justice. His idea of justice begins and ends with the principle of 'fair-mindedness', 'the same law for all, rich and poor alike', and 'the case must be decided on the evidence'. The Englishman knows what justice means in a particular case. And no doubt what it does mean varies according to the moral and sociological ideas of the time. The English lawyer tries to adapt and interpret the law so as to follow—not indeed to keep pace with, but so as not to be entirely out-distanced by developing social ideas. Yet in so doing he does not for a moment conceive himself as applying the principles of anything in the nature of an abstract system or of giving effect to the general rights of man. His attachment is to an idea which if not completely concrete yet certainly is less abstract than the idea of justice. His devotion has been to the common law—I am talking of the lawyer's devotion—which he believes to be the best law in the world, perhaps because it is *his* law: he made it and exported it round the world with *his* coal, *his* cotton goods, *his* colonial rum and *his* Bible. And so his conception of justice is essentially pragmatic, as seen and experienced and enjoyed in an actual system; beyond that no lawyer will go. He sets the wisdom of the ages, or at least of the sages of our law, against the individual's conception of justice. He argues, 'justice is either an individual idea (like that of conscience or divine inspiration) which leads to excessive nonconformity or it is a social concept held by the many. If it is the latter, what else or better can it be than the ideas embodied and preached in the English Common Law—the finest body of law in the world'. It is a very simple idea, and no doubt a very childish one. But it has worked. And the Englishman, who suspects anything which is not practical, wishes to look no further.

That does not mean that these somewhat jejune ideas are not unconsciously based on principles which are eternal and immanent in the very nature of things. No doubt they are, but the average Englishman would probably be quite surprised, if not a little shocked, to be told so. Yet the Englishman knows in a vague sort of way that the effect (if not the purpose) of the law is to protect him in the enjoyment of his own rights and to ensure that others perform their obligations. And accordingly for the major concrete instances of law he has profound and traditional respect. He may be impatient and intolerant of what has been called the small change of legislation: Regulations and Orders. He is slow to realise that in a complex and developing social and economic community you must have an increasing regulation and organisation of detail if the machinery of society as a whole is to work smoothly. Things which the community consider merely *mala prohibita* he will disregard if he can. But the things which the community regards also as *mala in se*—either because it is traditional so to do: 'God bless the Squire and his relations and keep us in our proper stations', or because they conflict with the fundamental rules of 'mine and thine' or of 'do as you would be done by'—laws as to these he instinctively obeys although the sanction behind them is no more stringent. If a substantial proportion of the community has become accustomed to regard a particular law as unjust, then the individual will not easily be frightened into obeying it merely because it is a law and the State and the lawyers and the police are behind it. On the other hand, if the law corresponds with the accepted social concepts no pressure from the police is required to secure obedience to it. The result is increasingly that laws which offend against the current sense of what is just are either not made or cease to be enforced. And ultimately, although not designedly, the fundamental strength of the law in England is not the penalties attached to its violation, not the ever-present fear of the police or the Gestapo or its counterpart which compels obedience in some other countries, but the general recognition that the law does exist to protect him and his in the ordered society in which he lives. And so, although the Englishman has a contempt for legalism he has a profound respect for law. And it is, I think, true and not without interest that a developing social sense makes the individual realise that those things which the State finds it expedient to make *mala prohibita* become thereby *mala in se*. Hitherto it has been the law in England that before a director

or officer of a company could be made criminally responsible for acts committed by the company it had to be shown that he personally had a hand in it; a difficult thing. In Parliament the other day we discussed an alteration which would have the effect in certain cases of making directors guilty unless they proved they had not been involved. It was suggested that this reversal of the usual onus of proof should be restricted to offences of dishonesty and not applied to breaches of regulations. But I think my submission was generally accepted, that breaches of regulations established by the State in the interests of the community—black marketing, for instance—were morally as reprehensible as offences of dishonesty against individuals.

'Justitia est constans et perpetua voluntas jus suum cuique tribuens. . . . Juris praecepta sunt haec; honeste vivere, alterum non laedere, suum cuique tribuere'. So Justinian. Perhaps, after all, Justice, like Peace, is universal, and there is in the result not so much difference between the Romans who laid down their basic principles in advance and the English idea of justice which follows from such accepted notions as freedom, equality of all before the law, fair play.

In no country in the world, in no system of law, are such fundamental human rights as freedom of speech, liberty of the subject, freedom from arrest, and so on, more highly regarded yet at the same time less concretely expressed. If you ask where are these principles to be found in English law, the answer is nowhere—except in the rule, itself expressed in Magna Carta, that the Crown will go against nobody except in accordance with the law of the land. And as there is no law which forbids a man to speak—unless what he says be treason or blasphemy or sedition—a man is free to speak his mind when he will. So with liberty and freedom from arrest. A man does not have to point to any legal or constitutional guarantee; no one can arrest him save for a crime of which they must at once prove him guilty at a public trial. And by an ingenious interpretation of an ancient formula of arrest, designed to bring a man up for trial in the King's Courts, the Writ of Habeas Corpus has, whilst preserving its ancient form, been translated into the exact opposite of what it once was and has become an instrument which effectually secures individual liberty.

What, then, is this English Common Law of which the English lawyer is so proud? It is notable that almost every legal term of importance in English law, except the word 'law' itself, comes to us from the Norman French. Yet—

significantly—law is a Danish word, a legacy from the reign of King Canute. And so the first curious thing about the common law is that it was only made possible by foreigners: William of Normandy, Henry I and Henry II, Count of Anjou. More particularly the Count of Anjou. Although it would not be true to say that they created it they certainly built it up out of a mass of Anglo-Saxon and feudal customs. Indeed, the Englishman's most boasted possession—one of the vital protections of our liberties—trial by jury, was imported by the Normans, and in its origin was a royal means of obtaining information from, not of protecting, the subjects. Nevertheless, trial by jury would hardly have come to flourish in England had it not had close affinities with Anglo-Saxon practice. It was a link between centralised Government and royal justice and the close neighbourly units of an earlier period, the hundred and the tything, the smallest social and political unit of a more primitive period corresponding to your own hundred and decurie in the Gaul of the Frank period. Again, the most characteristic aspect of Royal justice, namely, the itinerant justices progressing from the central courts in London throughout the counties of England, was an importation from the Normans, who received the institution as a legacy from the Court of Charlemagne. The unification of France, political, commercial and judicial, dates only from the first Napoleon. One of your Jurists has said that England had ' a precocious sense of national unity '. It is owed, as Sir John Marriott has said, in large measure to the development at an exceptionally early stage of her political evolution of a strong central administration in the hands of a succession of able and masterful Kings. Thanks to the regular circuits of the King's Justices in Eyre and to the survival of such popular institutions as the Shire Court, the hand of the central authority was felt in the remotest parts of the kingdom, and as a result feudalism was never permitted to dismember England as, for several centuries, it dismembered France. Today, as from Plantagenet times and before, the whole English legal system is pivoted on the Judges in London, a score or so of men who try cases in the High Court and at periodical intervals travel round the country administering the King's justice at the Assize towns in a system which is substantially the same now as when it was fixed in the reign of Henry II. Under them, distributed throughout the country are about sixty County Court Judges who deal with civil claims of limited amount, with appeal to

the High Court, and the magistrates and lay justices of the peace who try the minor criminal cases.

It was largely the result of centralisation of the Judges and the lawyers in London that led to English law being forensic and strictly professional in origin, whereas Roman law and many systems deriving therefrom are scholastic. Until the late nineteenth century academic lawyers—Jurists in the continental sense—played no part in the development of English law. The lawyers developed their law in their own colleges of law, called the Inns of Court, undisturbed by the currents of humanism eddying in the great world and even in the Universities of Oxford and Cambridge, to say nothing of the great continental seats of learning. The Judges always have been and still are promoted from the ranks of practising barristers—and this, of course, is one of the marked distinctions between our two systems; they are not a profession apart from the profession of practising lawyers: they are themselves practising lawyers, and their career and training has been in no wise influenced by the State except when they come to be selected and appointed as Judges. And even then there is no question of the State examining and accepting a candidate. The men who have come to the top of their profession, who are highly thought of by their colleagues and by existing Judges, come in the course of time to be invited to become Judges themselves; if they accept they are entirely free of State control, for once appointed, a Judge cannot be dismissed except on an express vote of both Houses of Parliament. And so English lawyers have a monopoly of carrying on the law. The State may change the law: it does not determine who is to administer it. On the whole, the result is beneficial, and we think that Judges are more carefully chosen than if the test were some State examination. Their intellectual attainments, at least in the law, have been demonstrated by the extent of their practices, and all sorts of other imponderable considerations are taken into account in their selection. And the system also results in the most complete confidence between the Judges and the practitioners: one of the most cherished and guarded of professional traditions is the respect always shown by the Bar to the Bench. Most barristers hope to become Judges, and no barrister who broke the tradition would be likely to be promoted; indeed, there are instances of this in our professional history, for the Bench plays an influential although indirect part in the selection of new Judges.

The chief limitation upon the apparently almost absolute

authority of the Judge is the part played by laymen in the administration of the law. Indeed the marked feature of English institutions in general is co-operation between lay and professional elements: the Englishman trusts his great men, but to be on the safe side he rarely allows them to be completely irresponsible. Where power is given to a professional it is leavened with a lay element, and where the primary authority devolves on a layman he is given a professional assistant to keep him right: you find that right through the English machinery of government. The lay justice of the peace has to have the assistance of a trained lawyer as his clerk. And so the Judges in all criminal trials and, if one of the parties so chooses, in most civil ones has to be assisted by a jury, whose function it is to decide the facts and pronounce the verdict. There have been criticisms as to the value of this large use of the lay element in complicated cases. Juries may be stupid, bigoted, influenced by extraneous considerations. But so also may Judges. It is better to risk a bad jury making a mistake in a single case than to have a bad Judge able, if not checked by a jury, to make mistakes throughout his judicial career. I believe myself that the jury system has on the whole worked well and that it is an essential safeguard of English freedom. The jury is the representative of the reasonable man—'the twelve men on the Clapham omnibus'—who have done so much to temper the administration of the law to the changing circumstances of the time. The function of the Judge in criminal and civil trials is one of strict impartiality: he has to hold the scales between opposing parties. Here again you see a marked difference between English and continental practice. The behaviour which is expected of the Judge in different ages and by different systems of law seems, as Maitland has said, to fluctuate between two poles. 'At one of these the model is the conduct of the man of science who is making researches in his laboratory, and will use all appropriate methods for the solution of problems and the discovery of truth. At the other stands the umpire of our English games, who is there not in order that he may invent tests for the powers of the two sides, but merely to see that the rules of the game are observed'. It is towards the second of these ideals that our English medieval procedure is strongly inclined. We sit in Court not in order to discover the truth but in order to answer the question 'How's that?' In other words, the Court decides the case on the evidence which the parties adduce; it is not for the Judge to probe and inquire

into absolute truth: he is to say only what appears true on the evidence before him, which may not be the same thing.

And so in the field of criminal law our system is accusatorial and not inquisitorial. Before trial and at trial the accused man is stringently protected against any kind of inquisitorial examination. It is not for the Judge to inquire into a crime: neither in relation to the accused nor to a witness does the Judge conduct the case. It is a contest between counsel. A definite charge must be made against an individual. The admissible evidence to prove that charge—and it is for the prosecution to prove it—is strictly limited; only the sworn testimony of witnesses can be heard; there must be no hearsay; evidence of other offences, previous convictions or bad character is in general excluded. The trial must take place in public and in the full limelight of the newspapers. It is over a trial thus conducted that the Judge presides. He is the umpire, to see fair play and to make sure that no innocent man is convicted.

Voltaire said of French law that 'when a man travels in France he changes laws almost as often as he changes horses'. But the concentration of justice in the hands of a central Judicature secured a body of law which was common to the whole land: that is the original meaning of common law. It is law for England, not for this county or that town. And it was and still is developed by the Judges by means of the familiar English legal doctrine of judicial precedent. In one sense it marches with the potent idea that the common law is based on reason, and the comforting but patently untenable notion that what was reasonable 500 years ago must be reasonable today. 'Reason is the life of the law', said Chief Justice Coke. And, said Mr. Justice Powell in the sixteenth century, perhaps with more optimism than truth: 'Let us consider the reason of the case, for nothing is law that is not reason'. Judicial precedent is the very fabric of common law, and the Judges have always sought so to adapt and interpret the existing law as to make it conform to what appeared to them—not necessarily to the majority of the people but to them as members of the dominant class brought up in a profession which does not perhaps encourage any great broadness of outlook—to be reasonable as at the time of their decision. From Bracton in the thirteenth century onwards our Judges have been conscious that they were not only deciding a case, but to some extent laying down a rule for the future. The principle of *stare decisis* has been much agitated

in America and on the Continent as against the principle of free decision, but the common law must, I think, necessarily be kept within the leading strings of judicial precedent: it is inevitably so in a system of law where there are no codes or, as in Roman law, authoritative institutional writers. But, as Lord Wright has said, a good Judge is one who is the master and not the slave of his authorities. And sometimes it happens that a Judge allows himself to be too much overawed by decisions of Courts of co-ordinate jurisdiction to his own. 'The mere citation of authorities', Lord Dunedin, another of our great Judges, said in one of his cases, 'is inimical to clear decision'. It would be a good thing if only the decisions of the Court of Appeal and the House of Lords were regarded as binding. But even as it is, the pragmatic and functional character of the common law is vividly illustrated by the way in which the principle of judicial precedent is worked out. It is not a legal dogma but a means merely of reconciling the decision in the instant case with the general body of law. That may sound like putting the cart before the horse, and it is perhaps an exaggeration. But there is truth in it, especially in these days when Judges show more initiative and courage in taking a new line. This adjustment of former precedents to the needs of the day displays, I venture to think, the intensely practical genius of the English lawyer. The whole conception of negligence, a tort which has developed in less than two centuries and cases on which occupy possibly more time in the Courts now than anything else, is the common law response to the realisation of social responsibilities unthought of in the eighteenth century. The vehicle by which this development has been effected is the reasonable man. Since common law is founded on reason, and since common law enforces a standard of conduct, the common law demands that all of us should conduct our affairs as the reasonably prudent and careful man would do. The reasonable man is nothing more than the hypostasis of contemporary habits and conducts. He is not the grave and virtuous man whose life is ordered according to the eternal verities, spiritual, moral and intellectual. He is the nimble product of the age he lives in, who must get accustomed to motors, and railways, and aircraft, and all the dangerous products of contemporary civilisation. And, to take a recent instance in the development of our law, when such a man manufactures goods or puts them up in the form in which they are to reach the public, he owes a duty to every potential consumer to use care in what he does: the

more dangerous the things he uses the greater his care must be. This idea, divorced from culpa or even sin, has a most liberating effect on the grip of precedent. Problems have to be reconsidered in the light of contemporary thought and habit. Unlike the practice in your Court of Cassation, English Appellate Tribunals can reconsider facts as well as law, and they have therefore a wide scope in gradually remoulding a principle. And there are two other ways in which English Courts avoid the oppression of *stare decisis* in its extreme form. The first is a method which, itself pushed to an extreme, would involve the complete stultification of the whole system. It is that each case depends on its own facts and is only a binding authority in subsequent cases presenting precisely the same facts. That doctrine is applied with circumspection, but from time to time the House of Lords relegate inconvenient decisions, even of their own, into the background by saying that they depended on their own particular facts. The second method, judicially sound and infringing no rules of intellectual integrity, is to consider the whole line of cases dealing with some particular aspect of the law and to re-interpret them in a wider or narrower rubric. A great English lawyer, now, alas, dead, Sir Frederick Pollock, happily named these two processes. The first is the path of judicial valour; the second, the path of judicial discretion. And not in law alone is discretion sometimes the better part of valour. This reconsideration of authorities is the way in which the Courts, mainly the House of Lords, have kept the law reasonably in touch with the circumstances of the times. A notable instance of its operation was in the case of William Joyce, a man who, like Paul Ferdonnet, le traitre de Stuttgart, broadcast propaganda for our enemies during the war. At the end he was arrested and brought for trial as a traitor. It turned out that although he had always professed to be English, he was, by chance of birth, an American subject. By English law the only persons who can be guilty of treason are those who owe allegiance to the British Crown, and it had hitherto been assumed that only British subjects or aliens who were actually resident in England were under such a duty. But when the old cases were examined it was seen that the essence, the raison d'être, of allegiance was something other than that. In 1608 Lord Coke had said that the basis of allegiance was the duty which was owed by the subject in return for the protection he received from the Crown. 'Protectio trahit subjectionem et subjectio protectionem.' In those days the Crown could not extend its

protection beyond the seas, but in one of the early cases it was pointed out by the Judges that an alien going abroad but leaving his family or property in England still enjoyed the protection of the Crown and so owed a duty of allegiance. The growth of international law and diplomatic usage enables a State to extend its protection outside its own territory. Joyce, although an American, had represented himself to be British, he had secured a British passport and with it the protection of the British State abroad through its consular and diplomatic officers. He had, so to speak, clothed himself in the Union Jack. And so the Courts had no difficulty in holding that the law of 1608 as applied to the changed circumstances of 1945, covered his case. I mention that just as an instance of judicial adaptation. And that process has given the English law some advantages over codified systems. Sometimes, no doubt, codification is a very beneficial process. We have ourselves codified some branches of our law—the sale of goods, company law, and so on. But it is not possible to do as Napoleon recommended, to devise a code so simple and precise that any Court can settle any dispute as easily as if it were a mathematical problem to be solved by looking at a slide rule. Codes either tend to sterilise legal development, and consequently to require frequent amendment, or have to be drawn in such general terms as to enable development to go on by judicial interpretation.

In saying all this, I do not want to be thought for a moment as underestimating the magnificent work which has been done by your Judges, and especially by the Court of Cassation in the adaptation of the Code of 1804 to the changing needs of the times. One sees many instances of extension and interpretation like, for instance, the presumption of liability on the part of motorists under Article 1384. But the French Judge may in the end find himself up against the provisions of Article 4, which precludes him from giving a general decision. In England the Judges have in the main been free, in their function of interpretation, from the embarrassment of a code. In the result, making full use of elasticity in the authorities, the law has been broadened down from precedent to precedent, the obsolete being so far as possible discarded, the useful being interpreted so as to fit the new circumstances. It is, as has been said, one of the incalculable advantages of the common law that it is capable of application to new circumstances perpetually recurring. A case can never come before our Courts in which the Judges can say there is no law to govern

this. The result is perhaps that in some measure English law is more coherent than French law because the English Judge is tied to previous decisions.

That is, of course, not to say that legislation by Parliament is not also an important source of law in England; of course it is. There are occasions in which the result of judicial interpretation has produced some eventually rigid rule which in the course of time has become so manifestly inconvenient that Parliament has had to interfere. And various branches of the law have, as I said, been codified. Moreover, in a modern State where the function of government and of social and economic life constantly becomes more complex, an increasing activity in deliberate legislation is inevitable and is indeed desirable. Marketing schemes, Town and Country Planning Acts, Statutes for nationalising industries or controlling commercial and financial activities—all these become essential in the planned economy which alone can be expected to ensure reasonable prosperity for the mass of the people in these complicated times.

Yet, even so, in spite of the increasing mass of legislative enactments, the common law and the Judges continue to exercise a dominating influence on the administration of the law. It is not only that they are supreme in those fields—and they are wide—which are not covered by legislation at all: it is that they have to interpret and apply the statutes, to reconcile them with each other, to make a coherent whole. It has been said that Parliament passes the statutes but the Judges make them, since so much of the meaning and operation of the statutes depends on the interpretation of the Judges. And so the statute law becomes merged into the administration of the common law and common law principles and precedents are applied to it. And the fundamental rules remain—liberty; freedom: these are rooted securely in the common law.

To say all this is not to ignore the position of what is called Administrative Law in the English system. It used to be something of a fashion amongst English lawyers to condemn the French system of contentieux administratif and to pretend that we had no comparable arrangement. I doubt whether that was ever true; it certainly is not now. And nowadays all but the legal purists accept something in the nature of administrative law, removed from the more cumbrous, expensive and dilatory processes of the ordinary Courts of law, as an inevitable concomitant of the necessarily increasing intervention of Parliament in the social and economic life of the country.

There are, it is true, here and there distinguished English professors who, divorced from any experience in the practice of the law and possessing no responsibility either for making or for administering it, devote their periodic excursions into literature and journalism to somewhat polemic attacks on the work of the various administrative tribunals and on the activities of the Government officials whose task it is to administer various statutes. But although these armchair criticisms are always entertaining, they betray an increasing detachment from reality. Parliament is obviously of the view, as also are most distinguished lawyers, that many disputes arising from the intervention of the State into the industrial, the social and the planning fields are entirely unsuited to decision by the ordinary forms of law, partly because of the great number of cases to be decided, and partly because of the technical knowledge required to decide them. The reasons which have led the trading community to avoid—to an extent unparalleled in any other country—the ordinary machinery of the law have not been without their effect upon the growth of administrative law. I shall not examine them here, but I have no doubt myself that whilst our arrangements differ from yours—and yours may well be more efficient—administrative law as we understand it has worked well in England, and ample safeguards exist against its abuse.

In any event, it covers but a small field. It is, and it will remain, a paramount rule of English law that all are equal before the law. If offences are committed, superior or official orders afford no excuse. For breaches of the law all are triable by the same processes and in the same Courts. And if particular disputes are triable only by administrative tribunals, it is because they concern special rights which particular citizens enjoy because of the operation of some Act of Parliament which the Legislature has decided can best be administered by those who possess other qualifications than the merely legal ones. There is no threat to the rule of law here.

May I end these rather desultory and disjointed remarks by saying that whilst I have of necessity been talking always of the English law, I have not done so in the belief that our system is perfection or better than any other. On the contrary, I have attempted to show that in England, as elsewhere, our legal system is the result of many circumstances peculiar to our particular historical and social and economic development. There is much in it that would be wholly inappropriate for other places and other peoples. But when I said that the

English have no conception of justice in the abstract, that was not a cynicism, but embodies the profound truth that the Englishman feels that in the circumstances of his country, with the traditions of his people, the English common law, with its system of procedure, evidence and trial, does secure the fundamental right to a fair and patient hearing of his case and its eventual settlement by a rule of law which, whilst not arbitrary, is extremely flexible.

But the study of law in the abstract is now attracting much more interest than it did fifty years ago. Academic lawyers have made important contributions to our knowledge, and we are beginning to realise that it is just possible that the law is, after all, not the one matter in which we have nothing to learn from other countries and other systems. There is an active spirit of law reform in England at the present time. The study of comparative law, hitherto not greatly encouraged, is increasing and is, I believe, most valuable. That is why I have been particularly glad to avail myself of the opportunity of meeting my French colleagues and of seeing something of how you do these things in France.

THE LEGAL UNITY OF HUSBAND AND WIFE

On December 5, 1945, some surprise was caused by the report of a decision of the Tonbridge Bench. According to the newspapers the decision was that a man committed no offence in using the return half of his wife's non-transferable railway ticket, because husband and wife are one person in law. One recalled the words of Lush J. in his work on *Husband and Wife*[1] that the latter rule 'at the present day lifts its head hydra-like and is on occasion applied with surprising results'. However, the Chairman of the Bench of magistrates afterwards wrote to *The Times* (December 8, 1945, p. 5) denying the correctness of the report, and asserting that the decision had actually proceeded on the prosaic ground that the husband had no intent to defraud the company.[1a] This explanation robs the decision of the dramatic interest that it would otherwise have had, but the occasion may be taken to comment upon the scope of the venerable maxim thus brought to the public notice. The question to be answered is whether the maxim represents a living principle of law, from which new deductions may legitimately be drawn.

The notion of conjugal unity has a biblical origin. Genesis, ii, 24, is explicit that husband and wife 'shall be one flesh', and this is repeated in the New Testament (Matthew, xix, 5–6; Mark, x, 8). There can be no doubt that it was this theological metaphor that produced the legal maxim. It is found in the earliest English law book, the *Dialogus de Scaccario* ('*Satis audisti quod "qui adheret" mulieri "unum corpus efficitur", sic tamen ut caput eius sit*'—II, c. 18), and even more clearly in Bracton ('*Vir et uxor sunt quasi unica persona, quia caro una et sanguis unus*'—f. 429b; cp. f. 32). Thence it passes to Littleton and Coke (Co. Lit. 112a, 350b), and becomes part of the stock-in-

[1] 4th ed. 58.

[1a] The decision was reversed on appeal by a Divisional Court on the ground that the offence charged had been proved, notwithstanding an absence of intent to defraud (*The Times* newspaper, May 9, 1946). No reference appears to have been made to the doctrine of conjugal unity.

trade of the common lawyers.[2] Since the idea is as much biblical as legal, we cannot say that the use made of it by Shakespeare is evidence of any special legal attainments.

> *Hamlet.* Farewell, dear mother.
> *King.* Thy loving father, Hamlet.
> *Hamlet.* My mother: father and mother is man and wife, man and wife is one flesh, and so, my mother.
>
> *Hamlet,* IV, 3, 53–5.

> *Portia.* I charm you, by my once-commended beauty,
> By all your vows of love, and that great vow
> Which did incorporate and make us one,
> That you unfold to me, your self, your half,
> Why you are heavy.
>
> *Julius Cæsar,* II, 1, 271–5.

In any case it was not Shakespeare but Byron who gave to the notion its wittiest expression—and no one has accused Byron of legal leanings.

> Why don't they knead two virtuous souls for life
> Into that moral centaur, man and wife?
>
> *Don Juan,* canto 5, clviii.

When the judges come to state its legal aspects they do so with some caution. 'In the eye of the law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true': *per* Maule J. in *Wenman* v. *Ash* (1853).[3] 'It is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense': *per* Lush J. in *Phillips* v. *Barnett* (1876).[4]

In truth the maxim is a misleading one, even as applied to the unreformed common law. For one thing, if left without explanation it may suggest that the spouses participate equally in the personality that is thus created out of them; whereas it would be closer to the rules of the common law to say, in the words of the wag, that 'man and wife are one—but the man is the one'. Blackstone expressed the equation more soberly when he said: 'By marriage, the husband and

[2] A Year-Book reference is in Y.B. (1443/4) H., 22 H. 6, 38a, pl. 6. See also Fortescue, *De Laudibus,* ch. xlii. Later discussions will be found in Noy, *Maxims,* No. 29, and Com.Dig. Baron & Feme (D).
[3] 13 C.B. 836 at 844.
[4] 1 Q.B.D. 440.

wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband' (1 *Comm.* 442). For this interpretation of the maxim a seventeenth-century judge found authority in Holy Writ. 'In the beginning', he declared, 'when God created woman an helpmate for man, he said, "They twain shall be one flesh"; and thereupon our law says, that husband and wife are but one person in the law: presently after the Fall, the judgment of God upon woman was, "Thy desire shall be to thy husband, for thy will shall be subject to thy husband, and he shall rule over thee" (Gen. iii, 16). Hereupon our law put the wife *sub potestate viri*, and says, *quod ipsa potestatem sui non habeat, sed vir suus*,[5] and she is disabled to make any grant, contract, or bargain, without the allowance or consent of her husband': *per* Hyde J. in *Manby* v. *Scott* (1663).[6]

Even as so interpreted, however, the maxim is an imperfect representation of the common law. If it were true that the legal existence of the wife was during marriage incorporated into that of her husband, it would follow that there would be a complete union of property rights. But this was not so, for the wife continued to own her freehold property, subject to certain rights of the husband. Again, the maxim, as so interpreted, would presumably mean that no notice should be taken of the wife in litigation; yet the law was that if a husband sued for a tort committed to his wife, or was sued for a tort committed by his wife, the wife had to be joined along with her husband as a party to the action. The wife was not reduced to the position in law of, say, a dog. Thus it is much closer to the truth to say, with Pollock and Maitland, that 'the main idea which governs the law of husband and wife [until the intervention of equity] is not that of an "unity of person", but that of the guardianship, the *mund*, the profitable guardianship, which the husband has over the wife and over her property'.[7] This is not to deny that the doctrine of unity played a part in developing some of the rules of law.[8]

With the intervention of equity and later of statute it

[5] This is almost verbatim from Bracton, f. 151b, reported in 3 Inst. 108.
[6] 1 Mod. 124 at 126.
[7] P. & M., 2nd ed:, i, 485; cp. *ibid.*, ii, 399 ff.; Holdsworth, *H.E.L.*, iii, 520 ff.
[8] Holmes, 'Agency' (1891), 4 H.L.R. at 353, reprinted in his *Collected Legal Papers* (1921) 61–2.

became crystal clear that a woman on marriage retained a legal personality distinct from that of her husband. Husband and wife are now totally distinct legal persons in the law of contract and the law of property. They can even contract with each other, or make leases to each other.[9] In particular, two rules of the common law that seemed to be based on the doctrine of unity have been abolished by statute: the law of tenancy by entireties,[10] and the presumption that where a husband and wife are included among joint tenants they take together a single share.[11] There are, however, still some special rules pertaining to husband and wife in the law of evidence, crime, tort, conflict of laws, status, income tax, and insurance; and some of these may appear, at least at first sight, to be due in whole or in part to the fiction of unity. They may be shortly considered.

(1) *Evidence.* At common law a husband and wife were not allowed to give evidence for or against each other. The origin of this principle, and the reason for it, are wrapped in some obscurity. Blackstone confidently put it on the doctrine of unity, which brought in the maxims *Nemo in propria causa testis esse debet*, and *Nemo tenetur seipsum accusare* (*Comm.* i 443). We cannot, however, accept Blackstone's authority as conclusive on a historical question of this sort. The earliest authority for the disability is Coke (Co. Lit. 6b). It is true that Coke refers to the doctrine of unity in support of the rule, but he adds that were the rule otherwise 'it might be a cause of implacable discord and dissension between the husband and the wife, and a meane of great inconvenience'. Lord Hardwicke echoed this in *Barker* v. *Dixie* (1735)[12]: 'The reason why the law will not suffer a wife to be a witness for or against her husband is, to preserve the peace of families.' Alternatively, Wigmore inclines to explain the rule by the repugnance of condemning a man on the evidence of those who share the secrets of his domestic life.[13] Either view seems to be a more likely

[9] *Pearce* v. *Merriman*, [1904] 1 K.B. 80. But where one spouse lives in a house owned by the other, it is normally difficult to find the relation of landlord and tenant between them, because of the unlikelihood that such was their intention: *Hall* v. *Michelmore* (1901), 86 L.T. 17, 65 J.P. 759, 50 W.R. 172, 18 T.L.R. 33; *Bramwell* v. *B.*, [1942] 1 K.B. 370; *Pargeter* v. *P.*, [1946] 1 All E.R. 570.

[10] It was held in *Thornley* v. *Thornley*, [1893] 2 Ch. 229, that the abolition of this tenancy followed from the words of the Married Women's Property Act, 1882.

[11] Law of Property Act, 1925, s. 37; pc. Carr, *Collective Ownership*, 13 ff.

[12] Cas. t. Hard. 264.

[13] *Evidence*, 3rd ed., § 2227; cp. Holdsworth, *H.E.L.*, ix, 197 ff.

explanation of the rule psychologically than the mere fiction of unity. The only difficulties with the two views are that they leave unexplained the capability of the parent and child, and that they do not afford a very satisfactory explanation of the inability of one spouse to testify *for* another. Perhaps the latter inability is to be explained by the probability of bias. However these explanations may stand, it is enough to say that the rule has been swept away by statute, together with the rule that parties to legal proceedings are themselves incompetent to give evidence. The common-law disability of the spouses survives only in two exceptions to the general principle that spouses are now competent and compellable witnesses for or against each other. First, a spouse is not a competent, or not a compellable, witness against the other spouse in certain criminal cases.[14] Second, spouses are not compellable to disclose communications between each other during marriage.[15] These exceptions can be regarded as resting on grounds of policy, or on the repulsiveness of compelling evidence, not on the fictitious unity of the spouses. It must be admitted, however, that the policy or humanitarianism of the matter may be the same between parent and child as it is between husband and wife; yet the privileges are not extended to the parental relationship.

(2) *Criminal Law.* It is in the museum of the English criminal law that the consequences of the doctrine of unity are most apparent.

(a) According to the text-writers, a husband and wife cannot be guilty of conspiring together. It seems fairly clear that this rule, if it exists, owes its origin to the doctrine of unity, or at any rate to the doctrine of the wife's subordination.[16] Can it be supported at the present day on

[14] See Lush, *Husband and Wife*, 4th ed., 592 ff.

[15] Evidence Amendment Act, 1853, s. 3; see thereon *Shenton* v. *Tyler*, [1939] Ch. 620. Holdsworth argued that in addition to this statutory rule there is a common-law rule, which still survives, rendering communications between husband and wife inadmissible in evidence ((1940) 56 L.Q.R. 137). It is respectfully submitted that his authorities are insufficient to establish the rule, which is wider than is required by the policy of the case.

[16] There are two Year-Book cases bearing on the conspiracy rule, though neither is directly in point. In Y.B. (1345) 19 E. 3, R.S. 346, a writ of conspiracy was brought against a husband, wife and third person. It was argued by way of objection to the writ that 'if this writ were good, for the same reason one would be good if it were brought against a husband and wife alone, and it could not be understood that a wife, who is at the will of her husband, could conspire with him, because the whole would be accounted the act of the husband'. The writ was upheld without reasons given. In Y.B. (1363/4) H., 38 E. 3, 3a, the point that a husband and wife could not be guilty of conspiracy was argued but not decided (unless the concluding clause of the report means that it was an alternative ground of decision); the rule was not attributed either to the doctrine of subordination or to the doctrine of

grounds of policy? One does perhaps have the feeling, at first impression, that legal consequences ought not to be attached to the confidences of husband and wife; but whether this feeling is strong enough to survive mature reflection is another matter. If it is thought desirable that the police should be able to take preventive and deterrent action against conspirators, there would seem on the whole to be no adequate reason for exempting the husband and wife from the operation of the general rule. The ordinary confidences of husband and wife are one thing, concerting to commit a crime quite another. It has never been suggested that a spouse cannot be guilty of inciting the other spouse to commit a crime, and there would seem to be no good reason for distinguishing between incitement and conspiracy. It may also be pointed out that although there is often a relation of confidence between husband and wife, a relation of confidence is not in itself enough to give exemption from the law of conspiracy. There is no legal protection for partners, or for parent and child, man and mistress, or lovers,[17] notwithstanding that *de facto* the relationship in any of these cases may in particular circumstances be closer than the relationship between an individual husband and wife.

The rule laid down in the textbooks has been unreflectingly followed by some Courts in America and New Zealand,[18] but there seems to be no case in which it has been applied by an English Court. Such cases as there are raise doubts whether it is to be regarded as part of the law of England.

It has been held, in the first place, that a husband, wife and third party can be sued or indicted for a conspiracy jointly entered into.[19] It is submitted that this rule is logically inconsistent with the alleged rule that a husband and wife cannot be guilty of conspiracy. If a husband and wife cannot legally conspire together, then in the case in question there should be two separate proceedings for conspiracy: one in respect of the conspiracy between the husband

unity. The last remark applies also to the earliest textbook formulation of the rule, in F.N.B. 116 L. (quoting the case of 1363/4). The rule is, however, attributed to the doctrine of unity in Staunford, *P.C.* 174a (quoting the case of 1363/4) and Hawkins, *P.C.* i, cap. 72, s. 8. From these writers it passes into modern textbooks. The scant authority for the rule is pointed out by Winfield, *History of Conspiracy and Abuse of Legal Procedure*, 64, 88; same, *Present Law of Abuse of Legal Procedure*, 159.

17 In *R.* v. *Robinson and Taylor* (1746), 1 Leach C.C. 37, it was held that where a man and woman first conspired and afterwards married, they could be convicted of conspiracy.

18 See note in (1927), 27 Col.L.Rev. 219.

19 Case of 1345, above, n. 16; F.N.B. 116 L.; *R.* v. *Cope* (1718/19), 1 Str. 144.

and the third party, and one in respect of the conspiracy between the wife and the third party. The fact that the conspiracy can be treated as single is an argument for saying that English law does recognise a conspiracy between husband and wife.

In the second place, it seems that a husband and wife can be regarded as conspirators for the purpose of making them parties to a consummated crime. In other words, whatever may be the case with regard to inchoate crime, it seems that a conspiracy between husband and wife can be taken into account in fixing responsibility when the major crime has been committed.

One type of case in which this question arises is where a married couple conspire to commit a crime, and the crime is then committed by the husband in the presence of the wife (or *vice versa*), the wife not assisting in any way. The question is whether on such facts the wife is a principal in the second degree. According to Russell, ' principals in the second degree are those who were present, aiding and abetting at the commission of the felony '.[20] His later discussion, however, shows that this definition is true only if eked out by the notions of constructive aiding and constructive presence, and it seems better to say that a principal in the second degree is (i) anyone who (intentionally) assists the crime at the time of its commission, even though he be not present at the scene of the crime (*e.g.*, one who entertains the victim while his house is being burgled), and also (ii) any conspirator who is present, even though he does not assist. If this be the rule, it will be seen that the question whether the wife in the above hypothetical case is a principal in the second degree depends upon whether she can be regarded as a conspirator. It is submitted that she can be regarded as a conspirator for this purpose, whatever may be the rule with regard to inchoate crimes.

This submission is supported by the usual assumption as to suicide pacts. It is usually assumed that if a husband and wife agree to commit suicide together, and the one succeeds in committing suicide but the other survives, the survivor is in law guilty of murder, just as much as if the parties had not been married. This assumption is clearly correct if the survivor killed the other spouse with his (her) own hand; the survivor is then principal in the first degree to the crime

[20] Russell, *Crime*, 9th ed., ii 1472

of murder. Also, if the survivor, while not killing the other, instigated the suicide of the other, the survivor will be an accessory before the fact to the self-murder of the other.[21] Then again if the survivor in any way assisted the other to commit suicide at the time of the perpetration of the deed, as by handing poison to the other, the survivor will be a principal in the second degree based upon presence and assistance. But if the survivor did not kill the other nor originated the suggestion of the suicide pact nor assisted the other to commit suicide, the survivor could be convicted as being a principal in the second degree only on the basis of being a conspirator who is present,[22] and the question mentioned above therefore arises.

The question may have arisen on the facts of *R.* v. *Abbott* (1903),[23] but it was not expressly noticed and the facts brought out in evidence are too scanty to enable one to form a certain judgment. According to the husband's confession, he bought some poison, his wife gave some to him and took the rest herself; the wife died and the husband survived. Kennedy J. directed the jury that if they found the agreement proved the husband was in law guilty of murder. It is clear that if the husband handed the poison to his wife and his wife then and there handed some back to the husband and took the rest herself, the husband could be convicted as a principal in the second degree on the ground of his assistance at the time of the crime. But it may be that all that the husband did was to make preparation for the crime at his wife's suggestion, and then to be present at its commission by the wife. In that event he could be convicted of being a party to the crime only on the basis of conspiracy, and it is submitted that there was a conspiracy in law for this purpose.

In *R.* v. *Crofts* (1944),[24] it was held that where there is a suicide pact between two persons who are not married, and in pursuance of the pact one of them commits suicide in the absence of the other, the survivor is guilty of murder as an accessory before the fact. The decision seems to

[21] An accessory before the fact to the crime of self-murder could not be tried at common law, because the principal could not be tried. The rule requiring the principal to be tried first was abolished by statute: Accessories and Abettors Act, 1861, s. 1, re-enacting earlier legislation.

[22] It was said in *R.* v. *Symonds*, The Times newspaper, Dec. 19, 1922, that if one party to the pact was present at the suicide of the other, he became a principal in the first degree; but it is submitted that this is an error.

[23] 67 J.P. 151.

[24] [1944] K.B. 295.

involve the proposition that every conspirator who is absent when the crime is committed becomes, when the crime is committed, an accessory before the fact. Once again it is submitted that the rule can be applied equally where the parties to the *de facto* conspiracy are husband and wife.

The law as to suicide pacts is so much out of touch with humane feeling that one is unhappy in citing such cases for a general proposition of law. Suicide pacts are entered into only by those who have sunk to the lowest pitch of human suffering, and it is not appropriate for the law to apply its sanctions to the wretched survivor. The remedy, however, is to get rid of the law of suicide pacts, not to nibble an exception in it by declaring that a husband and wife cannot be accounted guilty of conspiracy.

(b) A husband and wife cannot normally be guilty of stealing each other's property, because of the notional unity of possession.[25] The rule works badly, particularly in that it prevents even the receiver of property *de facto* stolen by one spouse from another from being prosecuted.[26] The rule is now modified by statute, and a prosecution lies if (i) it is brought for the protection and security of property, and (ii) it is brought while the parties are living apart, and (iii) it is brought in respect of an act done while the parties were living apart, or else in respect of a taking of property by one spouse 'when leaving or deserting or about to leave or desert' the other.[27] Since the general rule is untouched in other respects the Legislature must have regarded it as supportable on grounds of policy, apart from the doctrine of unity. It may be questioned, however, whether there is any satisfactory policy behind it.

(c) According to the very doubtful case of *R.* v. *Lord Mayor of London* (1866),[28] one spouse cannot, in general,

[25] The earlier authorities concern themselves only with the wife who steals her husband's goods, for the converse case could not arise at common law. The earliest authority for the rule seems to be Statham Corone 39, quoting Y.B. (1442/3) H., 21 H. 6, where Portington J. based it on the unity of possession ('property'). See also 3 *Inst.* 110; Hale, *P.C.*, i, 514; Hawkins, *P.C.*, i, 93 (6th ed. 141), cap. 33, s. 19. Hawkins says that a wife cannot steal her husband's goods 'because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them'.

[26] Hale, *P.C.*, i, 514; *R.* v. *Kenny* (1877), 2 Q.B.D. 307; *R.* v. *Creamer*, [1919] 1 K.B. 564. Hale says: 'Yet trespass lies against [the receiver] for such taking, for it is a trespass, but *in favorem vitæ* it shall not be adjudged a felony; and so I think the law to be notwithstanding the various opinions.' Thus Hale's opinion seems to have been influenced by the severity with which felonies were treated in his time.

[27] Married Women's Property Act, 1888, s. 12, re-enacted in the Larceny Act, 1916, s. 36.

[28] L.R. 16 Q.B. 772.

prosecute the other. The judgments recognise two exceptions to this general disability, and no more. The first exception is the rule that a prosecution may be brought for crimes involving personal injury. This rule existed at common law. The second is the statutory power to bring proceedings for the protection and security of property (above). Neither exception covers a prosecution for libel, and therefore (it was held) one spouse cannot prosecute another for libel.

The judgments of the Divisional Court in this case are open to several objections. In the first place, no authority is given for the alleged general disability at common law, nor is any reason suggested for regarding the first 'exception' as an exception, rather than as an illustration of a contrary rule of law. As to the second 'exception', although a statute was necessary to enable a spouse to be prosecuted for larceny of the other's property, this was not because of a general prohibition of prosecution at common law. It was due to the fictitious unity of possession which at common law destroyed the basis of the crime of larceny. The common-law rule that a spouse could not be prosecuted for larceny of the other's property was expressly attributed to the unity of possession, and this is in itself enough to show that no general prohibition of prosecution existed at common law.

In the second place, it is not stated in the judgments whether a third party (*e.g.*, a mother-in-law) could prosecute a spouse for crime (*e.g.*, libel) committed in respect of the other spouse. For all that appears in the judgments the prohibition is only upon proceedings taken by the spouses against each other. If this is the only prohibition it can be circumvented simply by a spouse getting a friend or relative to prosecute. Such a rule would obviously be unsatisfactory. Either the rule laid down by the Divisional Court has some policy behind it or it has not. If it has, it ought not to be capable of evasion in so simple a manner. On the other hand, if the rule is that nobody in the world can prosecute one spouse for a crime committed against the other spouse, it becomes necessary to distinguish between crimes committed against the other spouse as such and crimes against other persons—for clearly a married person can be prosecuted for crimes not committed particularly against the other spouse. This involves a new judicial classification of crimes. For instance, it would be necessary to determine whether insulting behaviour directed against the other spouse in public, whereby

a breach of the peace is likely (see section 5 of the Public Order Act, 1936) is a crime specifically against the other spouse, or a crime against other persons (*e.g.*, the State, or the public at large) on account of the danger to the peace. If the latter view were to be adopted, the further question would arise why the crime of libel should not be treated in the same way. Surely the theory of the criminal law is that all crimes affect the public at large, and if this be true it is impossible to divide up crimes in the way suggested.

In the third place, the judgments draw inadmissible inferences from the common-law rule that spouses could not give evidence against each other in criminal cases. This rule is evidently quite distinct from the alleged rule that spouses cannot prosecute each other, or that a spouse cannot be prosecuted for crimes committed against the other; yet the one rule seems to have been taken as establishing the other.

(d) One other rule of the criminal law may be mentioned before passing on. A wife who hides her felon husband from justice is not guilty as an accessory after the fact to the felony, but a husband who hides his wife is. It seems that originally the rule was merely that a wife who *receives* her felon husband does not become an accessory; the generalisation that she could never be an accessory after the fact to her husband's felony seems to be a later development.[29] The rule may be justified as a concession to inevitable human feeling, though of course this justification would require that the rule should also work the other way round, which it does not. However this may be, the fact that the rule does not work in the same way for both sexes seems to show that it is not a deduction from the idea of unified personality. If there is any technical doctrine behind it, it is the doctrine of the man's *potestas* over his wife, not the doctrine that the wife has no separate personality.

(3) *Tort.* (a) The rule still remains that no action in

[29] Bracton, f. 151b, says only that a wife is not bound to accuse or betray her husband, *cum ipsa sui potestatem non habeat, sed vir.* Cp. Britton, f. 47b (Nichol's ed., i, 120). Staunford, *P.C.*, i, 26, says generally that a wife cannot be accessory to her husband because by the law divine she ought not to discover him; he quotes Bracton. Coke, 3 *Inst.* 108, repeats Staunford. Hale, *P.C.*, i, 47, 621, says only that a wife who receives her felon husband is not liable *for such bare reception.* Hawkins, *P.C.*, i. cap. 1, s. 10, also says only that a wife shall not be deemed accessory *for* receiving her husband. But in *R.* v. *Good* (1842), 1 Car. & K. 185, it was said that a wife cannot be found guilty of comforting *and assisting* her husband; and in *R.* v. *Manning* (1849), 2 Car. & K. 903n., it was said that a wife cannot be convicted as accessory after the fact to her husband's felony. It has even been stated that a wife may receive another felon along with her husband: Hawkins, *P.C.*, i, cap. 1, s. 10, note to 6th ed.

tort lies between spouses, and this rule may have owed something in origin to the doctrine of unity, though a more practical reason would have been the wife's denudation of most of her property on marriage. The rule works extremely badly, as is shown by such cases as *Tinkley* v. *Tinkley*,[30] where the parties were in fact living apart and a cruel wrong by the husband went unredressed, and *Gotliffe* v. *Edelston*,[31] where the rule operated to protect the husband's insurance company. There is a statutory exception in favour of the wife where the action is to protect her property,[32] but this is by no means a complete remedy for the unsatisfactory state of the law.

(b) In *Wennhak* v. *Morgan* (1888)[33] the question arose for the first time in England whether a communication by a husband to his wife constitutes publication for the purpose of the law of defamation. It was held by a Divisional Court (Huddleston B. and Manisty J.) that it did not. Huddleston B. assigned no reason other than the legal unity of the spouses; Manisty J. gave this reason, but added that any other rule 'would lead to results disastrous to social life'. The case shows that the doctrine of unity may still yield new results where the policy of the case requires it; it is no authority for saying that the doctrine is to be applied blindly and without regard to its social consequences. In the earlier case of *Wenman* v. *Ash* (1853)[34] it had been held that a defamatory statement concerning one spouse and communicated by a third party to the other spouse is regarded as being published (even though a statement communicated directly to the person defamed is not regarded as being published). The difference between *Wennhak* v. *Morgan* and *Wenman* v. *Ash* cannot be explained in terms of the doctrine of unity, but only in terms of social policy.

(4) *Conflict of laws.* English law has adopted in a peculiarly uncompromising form the rule that the domicile of the spouses is the domicile of the husband. The rule may be based on the idea of unity or on the idea of the wife's subordination,[35] but it also has some justification on grounds of policy. In the usual case the family has in fact a single

[30] (1909), 25 T.L.R. 264.
[31] [1930] 2 K.B. 378. McCardie J. had much to say in this case about the doctrine of unity.
[32] Married Women's Property Act, 1882, s. 12.
[33] 20 Q.B.D. 635.
[34] 13 C.B. 836; followed in *Watt* v. *Longsdon*, [1930] 1 K.B. 130.
[35] See the argument in *Warrender* v. *Warrender* (1835), 2 Cl. & Fin. 488 at 508–9.

domicile, which is the domicile of the breadwinner; and since it is desirable so far as possible to preserve the unity of the family, the law should not lightly take the view that members of the family have different domiciles, with all that this entails.[36] There are cases, however, where the wife's legitimate interests demand that she should be allowed to establish a separate domicile, as for the purpose of divorce, or where the parties are living apart; and in such cases the American Courts have in general allowed a separate domicile to be created.[37] English Courts have failed to take this line, and have applied the rule of single domicile with complete disregard of its consequences for the wife.[38] For instance, if an Englishwoman in peace-time marries a man domiciled in Italy, who subsequently deserts her, she will be quite unable to obtain a divorce. She cannot obtain one in England, because in law she is now domiciled in Italy; and she cannot obtain one in Italy, which does not recognise divorce. It does not matter that the woman at the time of her marriage was a British subject domiciled in England; that the marriage took place in England; that the man she married was also a British subject; that he was resident in England at the time of the marriage; or that after the desertion he is still in England. Certain alleviations of the general rule are provided by the Matrimonial Causes Act, 1937, s. 13, and the Matrimonial Causes (War Marriages) Act, 1944; but these are typical pieces of botching legislation which, while covering common cases of hardship, leave the root of the trouble untouched.

(5) *Status.* Analogous to the unity of the spouses in respect of domicile is their unity in respect of nationality. No such unity existed at common law, for 'an English woman marrying an alien still remained a British subject; an alien woman marrying a British subject remained none the less an alien'.[39] Now, however, by statute, the general rule

[36] See Beale, *The Conflict of Laws*, i, 195 ff.

[37] Beale, *op. cit.* One of the leading cases is *Williamson* v. *Osenton* (1914), 232 U.S. 619, 58 L. ed. 758, 34 Sup. 442, where Holmes J. characterised the doctrine of unity as a 'vanishing fiction'.

[38] *Le Mesurier* v. *Le M.*, [1895] A.C. 517; *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; *Att.-Gen. for Alberta* v. *Cook*, [1926] A.C. 444; *H.* v. *H.*, [1928] P. 206; *Herd* v. *Herd*, [1936] P. 205. For a recent criticism of the state of the law, see Cheshire, 'The International Validity of Divorces (1945), 61 L.Q.R. 352. For a discussion of the only exception to the rule that jurisdiction in divorce depends upon the husband's domicile, see J. H. C Morris, 'Recognition of Divorces Granted Outside the Domicile' (1946), 24 Can.B.Rev. 73.

[39] Cockburn, *Nationality*, 11, 12, quoted by Holdsworth, *H.E.L.*, ix, 91; *Count de Wall's Case* (1848), 6 Moore P.C. 216.

is changed, and the wife follows the nationality of her husband, in the sense that she is a British subject if he is a British subject and an alien if he is an alien.[40] There are exceptions to this rule, and the worst cases of hardship have now been provided for.[41]

It may also be mentioned that a woman who marries a peer thereby acquires all the rights and privileges of the peerage so far as they are open to women.[42] Thus she becomes entitled to the privilege of trial by peers.

(6) *Income Tax.* Another statutory extension of the notion of unity is the rule that a man is assessable in respect of the income tax and surtax of his wife living with him.[43] No assessment can be made upon the wife, and consequently the penal provisions of the tax laws can be directed only against the husband. The rule is clearly capable of working injustice, particularly where a man of small means marries a rich woman who is unwilling or unable to put him in funds to meet the tax demand. The injustice is aggravated by a judicial ruling that, since no liability is imposed upon the wife, a husband who has paid tax in respect of his wife's income has no right of indemnity against her.[44] Also, if she has died, leaving her property elsewhere, he has no right of indemnity against her executors.

This provision of the Income Tax Act was presumably inserted for the convenience of collection. It does not itself follow from the common-law doctrine, except that it would probably not have been politically possible had there not already been a long tradition of the wife's subordination to the husband.

(7) *Insurance.* Another part of the law that may at first sight seem to have something to do with the doctrine of unity is that of insurable interest in life assurance. Section 1 of the Life Assurance Act, 1774, provides that no insurance shall be made on the life of any person wherein the assured shall have no interest. By section 3, no greater sum can be recovered under a policy of insurance than the value of the

[40] British Nationality and Status of Aliens Act, 1914, s. 10 (1), as amended by the British Nationality, etc., Act, 1933. The Act of 1914 re-enacted earlier legislation.

[41] See s. 10 (2)—(6) of the Act of 1918, introduced therein by the Act of 1933 (last note).

[42] *Per* Barnes J. in *Cowley* v. *C.*, [1900] P. 118 at 122; on appeal, [1901] A.C. 450.

[43] Income Tax Act, 1918, General Rules, r. 16.

[44] *Re Ward, Harrison* v. *Ward*, [1922] 1 Ch. 517.

interest. On the construction of these words it has been held that 'interest' means pecuniary interest.[45] Nevertheless it has also been held, by way of exception, that a man has an insurable interest to any extent in his own life.[46] As Farwell L.J. pointed out in *Griffiths* v. *Fleming* (1909),[47] no one can have a pecuniary interest in his own life, and thus the exception must be based on the interesting ground that an insurance by a man on his own life, though not expressly excluded from the statute, is not within the mischief of the statute. Nor have the Courts stopped there. In *Reed* v. *Royal Exchange* (1795)[48] Lord Kenyon laid it down in a casual way that every wife has an interest in her husband's life. The third step was taken as late as 1909, in the case of *Griffiths* v. *Fleming*, already mentioned, when the Court of Appeal held that a man has an insurable interest in the life of his wife. Farwell L.J. held that the decision in *Reed's Case* was 'on the same grounds on which evidence of insurable interest in the insurer for his own life would be excluded, namely, that the case was not within the mischief of the Act'.[49] 'If this be so', he added, 'it follows that the same principle must be applied to the insurance by the husband of the wife's life; a husband is no more likely to indulge in "mischievous gaming" on his wife's life than a wife on her husband's.' Nevertheless Vaughan Williams L.J. in the same case, quoted[50] without disapproval the decision in *Halford* v. *Kymer* (1830),[51] that a father has no insurable interest in the life of his son. Once again, a rule that is seen to be reasonable in the case of husband and wife is not extended to the relationship of parent and child, notwithstanding that it would be equally reasonable there. Despite this illogicality, it does not seem from the cases that the rule that spouses have insurable interests in each other's lives was developed as a deduction from the doctrine of unity.

The picture presented by these different departments of the law is a somewhat complex one, and it cannot be said dogmatically that the fiction of unity is or that it is not part of modern English law. All that can be observed by

[45] *Halford* v. *Kymer* (1830), 10 B. & C. 724.
[46] *Wainewright* v. *Bland* (1835), 1 M. & Rob. 481; (1836), 1 M. & W. 32.
[47] [1909] 1 K.B. 805 at 821.
[48] Peake Add. 70.
[49] At p. 821.
[50] At pp. 813–4.
[51] 10 B. & C. 724.

way of generalisation is that the fiction has been applied in certain contexts, but that in almost all of them it has subserved public policy, or at least humanitarianism. A doctrine that thus enables the Judges to mould other rules of law in accordance with public policy or humanitarianism is not lightly to be cast aside; but it is submitted that it ought to be used only to bolster up a decision arrived at on other grounds, and it is not in itself a satisfactory basis of decision.

GLANVILLE L. WILLIAMS.

EXPERT EVIDENCE

THE ever-widening range of scientific and technical knowledge provides the Courts of law with new or improved means for the investigation of truth.[1] Is the Law of Evidence as it stands today capable of making full use of this knowledge? Are the conditions under which English Courts receive expert evidence calculated to assist to the full in the ascertainment of truth?

English Law of Evidence recognises that in certain cases involving scientific or technical questions the Court may require the assistance of persons (experts) who, on account of special studies or experience, are conversant with matters of science and/or professional skill which are beyond the range of the tribunal. Little effort has been made to ensure that the evidence of experts is made available to the Court under conditions which guarantee, so far as possible, the reliability of the information presented. English law considers and treats experts as witnesses. Unfortunately, the customary safeguards calculated to ensure the credibility and veracity of testimonial evidence of a witness are in the case of experts in some respects unnecessary and unsuitable, in others insufficient.

A witness proper testifies before the Court to what he has, in the past, seen or heard with regard to the facts in issue; his testimony, in other words, refers to '*res gestæ*' of which he has gained casual perception on account of circumstances or situation peculiar to him. The number of witnesses who have personally observed the matters in issue is of necessity limited. Since a witness cannot be replaced, he must be heard in Court such as he is: a notorious liar, a child whose intellect is not yet fully developed should not be excluded; a person's partiality and bias may be obvious from the outset, but his evidence must be received. Only in the examination of the witness and in the assessment of the value of his evidence can the Court protect itself against the shortcomings of this instrument of proof of which it is aware.[2]

[1] See, for instance, A. C. Mitchell, *The Scientific Detective*, Cambridge, U.S.A., 1931.

[2] A person who informs the tribunal of facts of which he has gained casual perception in the past is properly treated as a witness even if he happens to possess particular knowledge or qualifications which enabled him to draw conclusions from what he has seen or heard which other witnesses (or the Court)

In certain respects the Courts find themselves in a more favourable position in cases which involve facts and circumstances for which technical or scientific expert evidence is required. In most fields of specialised knowledge and experience, there exist a number of persons capable of giving scientifically reasoned opinions on technical questions which may be required. The Court, in such a case, has a choice; it is not limited to such instruments of proof as chance has thrown in its way. The law can, at least to some extent, ensure that the expert or experts who are heard are qualified and fit to fulfil the function assigned to them. It is, on the other hand, imperative (much more so even than in the case of witnesses) that every possible safeguard be taken to avoid any possible bias and partiality of the expert. The reason is obvious: the more complicated and specialised the questions involved and the methods adopted by the experts, the greater is the dependence of the tribunal on their opinions and findings.[3] If there are certain subjects on which the Court cannot, for lack of special knowledge or experience, form its own conviction, it is likely also that it cannot properly assess the value of opinions and other evidence covering such subjects. As a desideratum, experts should inform the Court of the facts on which their view of the question submitted to them is based and the Court should be furnished with the necessary scientific criteria for application to the facts established in evidence. To expect, as English law does, the expert to place before the Court the 'basic facts' and to explain and assist the Court in understanding the material, may, however, become a hopeless endeavour where complicated calculations or principles are involved. It is a fallacy to assume that the Court can always be put in a position to ascertain whether the conclusion which the expert draws from the basic facts to complicated propositions are sound,

could not have drawn. Continental lawyers make a careful distinction between expert witnesses who possess technical or scientific training which enabled them to make reasoned observations during past events and are treated like witnesses, and experts (*periti*) whose function it is to give reasoned opinions on abstract questions and facts submitted to them.

[3] Recognising that in certain circumstances opinion is difficult to distinguish from fact and that it is indeed impossible for experts to limit their testimony to facts without expressing the conclusion drawn from such facts, English law has always excepted expert testimony from the operation of the so-called Opinion Rule which renders opinions, inferences and beliefs of individuals generally inadmissible evidence in a Court of law. The Opinion Rule, based historically and logically on the old demarcation line between the province of witnesses and that of jurymen, embodies the consideration that any expression by the witness of his opinion regarding any fact before the Court represents an interference with the task of the Court.

and it is an even greater fallacy to believe that this task will be in any way simplified if opposing experts draw different or even directly contradictory conclusions from the same 'basic facts'.[4]

Yet this is the practically inevitable result of the fact that our Law of Evidence leaves it entirely to each party to call, among its witnesses, one or several specially qualified persons who are to testify for them to scientific or technical questions which are likely to arise. Moreover, since no very stringent tests are applied in assessing the amount of scientific or technical qualifications required to enable a man to set himself up before the Court as an expert, the parties are encouraged to search for experts who support their case. Frequently diametrically opposed expert opinions are propounded at the hearing.[5] Experts tend by experience in English Courts to be biased in favour of the side which called them, took a proof of their evidence and is paying their 'expenses'.[6]

The danger that, among conflicting expert evidence, the Court may be induced to believe the expert who has succeeded in putting forward his views in the most persuasive and plausible manner,[7] cannot be forestalled by the rule that 'an expert must not be asked the very question which the Court is to answer'. This frequently leads to nothing but a play with words; thus, in *Rich* v. *Pierpoint* (1862), 3 F. & F. 35, it was held that, while a doctor must not be asked whether on the evidence he has heard he considers that there has been want of medical skill or whether there was negligence in the treatment, he may be asked whether he considers that there was anything improper in the treatment.[8]

[4] Cross-examination, moreover, frequently converts an expert who is trying to be impartial into one who is partisan when he finds himself attacked and his authority is challenged.

[5] To avoid loss of time and expense involved in calling medical evidence at the hearing of an action, an order can now be made in interlocutory proceedings before the High Court that medical reports be agreed between the parties, if possible, and that failing agreement the medical evidence be limited to two witnesses on each side (Cp. *Harrison* v. *Liverpool Corporation*, [1943] 2 All E.R. 449).

[6] In the United States, it is said, private experts can be found who will set themselves up as true advocates of the party calling them, and whose fees depend not only on their professional eminence, but also upon their rhetorical gifts (Shientag, 22 *Cornell Law Quarterly*, p. 192 ff.; Tchernoff-Schonfeld, *Expertises Judiciaires*, Paris, 1932, p. 215 ff.).

[7] Juries are said to be easily swayed by an expert with impressive qualifications who makes a sufficiently emphatic and positive statement.

[8] The proper and usual form is to ask the expert what, assuming such and such facts, is his opinion. The jury is then left to say whether the assumed facts exist.

Judges attach only slight value to expert evidence (cp. *e.g.*, *Bailey* v. *Clark*, [1902] 1 Ch. 670); they feel that the innumerable contradictions in the statements of the experts will, in the most complicated cases, finally throw them back upon their own resources. English Courts are reluctant to extend the ambit of expert evidence.[9] If, in a case involving complicated scientific or technical details which the Court is unable to resolve without expert assistance, the Court cannot come to any conclusion whether the expert opinion or opinions it has received are sound or not, or if it does not feel capable of overcoming the confusion created by contrasting expert evidence, 'the position is simply that the point is not proven and the loss falls on the party which bears the burden of proof on that issue' (*per* Lord Sumner in *Australia* v. *Nautilus*, [1927] A. C. 153).

In Continental jurisprudence the question has, indeed, been mooted whether, bearing in mind the difference of definition of the terms 'witness' and 'expert', an expert can or should properly be regarded as an instrument of proof at all. The function of the Court is considered to fall into two parts: to receive the evidence brought forward by the parties, and to render judgment. Where the Court consists of Judge and a special jury composed of men with particular experience and knowledge (for instance, merchants), the expert knowledge of the jurymen forms part of the knowledge of the Court, since the jurymen are members of the tribunal and take part in the deliberations and in the decision of the Court.[10] The Rules of the Supreme Court (R. S. C., Order XXXVI, r. 2) make it possible in special circumstances to call upon persons with particular knowledge and experience to take a place on the bench as assistants of the Court. If such assessors do not inform the tribunal, they cannot by definition be instruments of proof; they become auxiliaries of the Court, 'collaborators in the task of discovering the truth' (cp. Gulson, *Philosophy of Proof*, Nr. 546). The appearance of assessors is not frequent in English Courts except for nautical assessors in maritime

[9] Thus, in prosecutions for obscene publications, experts with literary knowledge are not allowed to give evidence whether a book in question can reasonably be described as obscene or indecent, because, it is said, they would be seeking to decide the very issue before the Court, *i.e.*, whether the law has been contravened.

[10] Cp. for example *Hagen* v. *National Provincial Bank*, [1938] 1 K.B. 169, where counsel was anxious to secure a more knowledgeable City Special Jury in preference to a common jury.

cases. The legal position of such nautical assessors was carefully considered by Lord Sumner in the *Nautilus Case* (*ubi supra*, at pp. 150–153), and the Judge came to the conclusion that such experts were not in any way entrusted with judicial functions, but were proper instruments of proof, since they remain 'sources of evidence as to facts', namely, maritime customs and experience. It followed that 'assessors only give advice' and that the Judges need not take it.[11]

Continental systems define an expert as a person who conveys to the tribunal scientific information on abstract questions of fact. This information is evidence, so long as it is submitted like all other evidential material, to the free evaluation and appreciation of the tribunal; the Court is not bound to act upon it, if it regards the opinion as speculative, inaccurate or untrustworthy.[12]

Most Continental systems have, on the other hand, recognised the fact that the Courts will in practice frequently be obliged to act upon the scientific information or opinion given by experts, and have taken safeguards to ensure that such expert evidence shall be objective and valuable.

In France, the problem of expert evidence has received considerable attention both from legislation and in authoritative textbooks, and a comparison with French law may prove not without value. The French Code de Procedure Civile (Titre XIV) contains a detailed set of rules governing the position and evidence of experts in civil actions.[13] Whenever in proceedings questions arise which cannot be resolved without special technical or scientific knowledge, the Courts may, upon application of the parties or *ex officio*, charge scientists or professional men with the task of furnishing an expert report ('expertise'). The choice of the persons to

[11] A peculiar position is occupied by medical referees under the Workmen's Compensation Acts, see Batt, p. 412. There is some authority for saying that the Court is bound to accept medical opinion of referees as true if uncontradicted (cp. *Evans* v. *Gilbie* (1926), 96 L.J.K.B. 117).

[12] Not so in Greece: Art. 298, Code of Civil Procedure of Greece quoted by Fragistas, *Rechtsvergleichende Betrachtungen*, p. 70.

[13] In French criminal proceedings, the appointment of the expert or experts rests exclusively with the Court. The expert reports orally at the hearing the results of the scientific investigations which he has carried out. Even if the expert submits the result of his work in written form, he must be called and heard to introduce his report and can be asked to give such supplementary explanations as may be required (Garraud, *Traité d'Instruction Crim.*, Vol. I, p. 628). In criminal trials the expert is sworn like a witness and liable to prosecution for perjury if he asserts false facts, but not, of course, for his opinions (Garraud, *Droit penal français*, Vol. V, p. 298). The subject receives no detailed attention in the French Code d'Instruction Criminelle.

be nominated rests in the first place with the parties (arts. 304, 305 C.Pr.Civ., not so under the Draft Code of 1934, art. 171); the Court is bound by their choice if they agree; if they do not, the Judge selects suitable persons. The appointment itself is in the hands of the Court.

The number of experts is usually three, but in any case an odd number, in order to facilitate the formation of a majority (art. 303 C.Pr.Civ.). The parties are, on principle, free to confide the task of preparing the 'expertise' to anyone they like without restriction, but in practice they select eminent persons who possess special qualifications to deal with the question at hand (Cuche, *Procedure Civile*, pp. 532–534).[14] A party may reject ('recuser') any expert proposed for the reasons which give rise to objections ('reproches') in the case of witnesses (art. 310).

The Code de Procedure Civile mentions the 'expertise' in no other form than by written report; this is in accordance with the predominantly written character of civil proceedings in France. The time taken for the furnishing of the report is said to be one of the reasons for the inordinate delays occurring in French proceedings; the report must now, under a law passed in 1935, be submitted within a maximum period of three months.[15] Even where there is more than one expert, one report only is drawn up (art. 318); it falls into two parts: a statement of the research, experiments and other investigations which have been carried out, and the opinion of the experts, *i.e.*, the conclusions drawn from the exposition of the facts. The report is frequently accompanied by elaborate plans and drawings. According to the express provision of art. 323 C.Pr.Civ., the expert report does not in any way bind the Court; it is intended to furnish the Judge with the assistance necessary to enable him to form a reasoned judgment (Dalloz, *Expertise*, p. 12 ff.).

Dominant French opinion holds the view that experts as

[14] For medical experts official lists exist at all Courts from which the choice is made. In some European countries, *e.g.*, Germany and Austria, the Courts establish lists of publicly accredited experts for certain branches of knowledge from which the choice is normally made (Art. 351, Austrian ZPO). In Austrian law, the choice of the person of the expert is entirely withdrawn from the influence of the parties, since they cannot even by agreement bind the Court to accept any particular person (Sperl, *Handbuch*, p. 444 ff.).

[15] Under the German and Austrian Civil Procedure Codes, the evidence of the experts appointed by the Court is given *viva voce* in Court, or occasionally before a commissioned Judge. The Court may ask for expert opinions ('Gutachten') to be submitted in writing, but this does not dispense with the expert's obligation to appear and give evidence at the hearing.

defined in the French Code of Civil Procedure cannot—as in England they must—be regarded as witnesses, and some writers go as far as to deny that they can be considered as instruments of proof at all. Glasson (*Traité de Procedure Civile*, Vol. I, p. 617 ff.) argues that the experts exercise '*une partie de la jurisdiction*' and regards them as assistants of the tribunal, carrying out a 'truly public function'. Glasson's view is based in the first place on the fact that, even though the parties may choose the persons of the experts, it is the Court which appoints them and invests them with their function. But there are a number of other points which speak in favour of his argument. Experts can refuse to accept the office (art. 316), while witnesses are, of course, obliged to testify whether they like it or not. When carrying out their investigations ('operations'), for example, when undertaking an inspection or an experiment, experts are entitled to put questions to the parties or their counsel present, and can even, according to some authorities, call in third persons who, though not as witnesses, may provide them with information. All information thus obtained forms part of the expert report. In support of his view, Glasson finally quotes French decisions which apply to experts the provisions of art. 224 of the Code Penal ('outrage') which threatens punishment for insulting behaviour towards persons in 'official position'.

By ruling that the experts should provide the Court with one report only, French law has avoided the danger of contradictory expert evidence which looms so large in English Courts. Nor has it overlooked the possibility of the Court being faced with insufficient or unsatisfactory evidence which Lord Sumner discussed in the *Nautilus Case* (*ubi supra*). If the French Court comes to the conviction that it has not received sufficient explanation of the technical or scientific questions involved, it is not thrown back upon its own resources. Art. 322 C.Pr.Civ. enables the Court to select and appoint—independent of the wishes of the parties—one or three new experts with the task of furnishing a new report.

As a result of the elaborate provisions of the Code de Procedure Civile, experts enjoy considerable credit and reputation in French Courts. Some French practitioners are, indeed, of the opinion that French Courts are inclined to accept expert evidence too lightly at its face value (Appleton, Avant Projet (1934), p. 8, Tchernoff-Schonfeld, *ubi supra*, p. 15), and assert that the Courts have fallen into the 'bad habit' of throwing their responsibility too often, and unnecessarily, upon

experts (Arminjon, 1936 *Bulletin de Legislation Comparée*, p. 226).[16]

In English Courts, where choice and nomination, and not least the actual examination of the expert is left at the beck and call of the parties, experts enjoy little credit. Lord Campbell's view, expressed a hundred years ago in the *Tracy Peerage Case* (1843), 10 Cl. & F. 191, 'skilled witnesses come with such a bias on their minds to support the case in which they are embarked that hardly any weight should be given to their evidence', still holds good to a large extent today. Between the two extremes of utter scepticism of and undue reliance on expert evidence the Courts must steer their course warily, and the law ought to be so framed as to assist them in this task.

H. A. HAMMELMANN.

[16] For this reason, the Avant Projet 1934 C.Pr.Civ. prescribes: 'An expertise cannot be ordered by the Judge except to aid him in throwing light on facts, documents and circumstances of a purely technical kind, knowledge of which is useful for the solution of the case. The expert report may not deal with the legal aspect of the matter. . . .'

VALIDITY OF GUARANTEES FOR DEBTS OF MINORS

I. In *Coutts and Co.* v. *Browne-Lecky and Others* (1946), 62 T.L.R. 421, the second and third defendants had guaranteed the amount of an overdraft granted by the plaintiff bankers to the first defendant, an infant. The second and third defendants contended that the plaintiffs could not recover from them because under section 1 of the Infants Relief Act, 1874,[1] they could not have recovered from the first defendant. All the parties knew throughout that the first defendant was an infant. Oliver, J., held that the plaintiffs could not recover. Under section 1 of the Infants Relief Act the loan to the first defendant was 'absolutely void'. There was therefore no liability on the part of the infant. A guarantee was a contract to make good a debt, default or miscarriage of another person. But in this case there was no debt, because the statute says so; there was no default, because the first defendant was entitled to refrain from paying; for the same reason there was no miscarriage. On principle there was therefore no liability on the part of the second and third defendants. There was, however, a dearth of authority in English law on the subject. There was no English case in point, apart from *Wauthier* v. *Wilson*,[2] where two of the Judges in the Court of Appeal had made *obiter* remarks to the effect that a guarantee of a transaction that was void under the Infant Relief Act would itself be void. Thus the Court felt constrained to rely on two persuasive authorities, one of them being a Scottish case and the other a quotation from Pothier. In *Swan* v. *Bank of Scotland*[3] the House of Lords held that under Scottish law a guarantee of a transaction that was void on the ground of illegality was also void. 'The only difference between those facts and the facts before me', said Mr. Justice Oliver, 'is that there is no illegality about the present transaction. Save for that difference, the facts in this case appear to me to be identical in principle.' Pothier's views were not ascertained from his original writings. Bench and Bar alike relied upon a citation contained in de Colyar's work on *Contracts of Guarantee*,[4]

[1] 37 & 38 Vict. c. 62.
[2] (1912) 28 T.L.R. 239.
[3] (1836), 10 Bli. (N.S.) 627.
[4] 3rd ed. (1897), p. 210.

where the following sentence is quoted from Evans's translation of Pothier:

> As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation according to the rule of law.

In these circumstances Mr. Justice Oliver concluded that he was bound by both—a clear legal principle and the decision of the House of Lords in *Swan* v. *Bank of Scotland*. This is therefore a case which is of particular interest to comparative and civilian jurists. Here is one of those, now comparatively rare, decisions where the civil law has been used as a persuasive authority. The result is disappointing. The Judge's own language shows that it did not fully satisfy him. That persons like the guarantors in this case should escape a liability that they undertook with the full knowledge of what they were doing is obviously strange. It is submitted that neither the civil law nor legal principle justify this result.

II. One of the fundamental principles of Roman law was that the fideiussio, the Roman cautionary contract which has formed the model for all its contemporary civilian equivalents, is, what is now generally called, an accessory contract:

> Fideiussor obligari non potest ei, apud quem reus promittendi obligatus non est.[5]

And[6]:

> Fideiussores . . . eorum obligatio accessio est principalis obligationis nec plus in accessione esse potest quam in principali re.

From Roman law this rule was taken over into the modern civilian legal systems. But from Roman law another rule was similarly taken over. It is stated in Pothier's work a few pages after the sentence which Mr. de Colyar quoted, and it considerably modifies that sentence.

In Roman law fideiussio could be used to guarantee not only ordinary debts, but also the so-called natural obligations.

[5] D. 46. 1. 16. pr. (Julian). The term 'accessory contract' is not Roman.

[6] Inst. 3. 20. 5; Gaius III, 126. The meaning of these passages is disputed. Against the interpretation adopted by the Pandectist interpreters see Riccobono, *Mélanges Cornil*, Vol. II, p. 309, note 1, and Beseler, *Zeitschrift der Savignystiftung* (Rom. Abt.), Vol. XLVII, p. 56.

> Ac ne illud quidem interest utrum civilis an naturalis obligatio sit cui adiciatur.[7]

The term and conception of natural obligations is not known to English law. In Roman law it developed during the period of the Empire. Not all cases of natural obligations were treated alike. In three respects, however, the same treatment applied to all kinds of natural obligations: none of them could be enforced by an action against the debtor in Court; the debtor of a natural obligation who had paid to his creditor could not recover what he had paid; securities given for a natural obligation were fully valid and enforceable.[8]

One of the cases of natural obligations arises in connection with transactions of minors. Transactions concluded by infants of under seven years of age were void. Transactions concluded by minors between seven and twelve years of age required the authorisation (auctoritas) of a tutor. If the tutor had not given his auctoritas, the minor was nevertheless not free from all liability. In the first instance, he was by the civil law bound to return anything still in his possession by which he was unjustly enriched. But even where no such enrichment existed, the transaction of which the tutor had not approved was not simply void. It was considered as imposing upon the minor a natural obligation. Such an obligation was sufficient to serve as the basis for a guarantee.[9] Minors between the ages of twelve and twenty-five could conclude valid contracts. Where owing to their minority they had been induced to enter transactions that were unfavourable to them or where their curators had entered such transactions for them, they could claim restitutio in integrum. Where a debt incurred by the minor was in consequence cancelled, this should automatically have resulted in the cancellation of any obligation incurred by a person who had guaranteed such a debt. However,

> qui sciens prudensque se pro minore obligavit, si id

[7] Gaius III, 119a, see also Inst. 3. 20. 1.

[8] See Buckland, Textbook, 2nd ed. (1932), pp 552 ff.; Jörs-Kunkel, *Römisches Recht*, 2nd ed., (1935), p. 167.

[9] D. 46. 2. 1. 1 (Ulpian); 46. 3. 95. 4 (Papinian). The differences between these and other texts, see *e.g.*, D. 12. 6. 41 (Neratius) are explained as a consequence of the fact that the law as stated in the text is a comparatively late development, Buckland, *l.c.*, Moyle, Institutions, p. 165. The validity of a guarantee for the debts of a pupillus, entered without the consent of the curator, seems to be post-classical. That the obligation of the pupillus is a naturalis obligatio seems to be a view which was not adopted earlier than in the time of Justinian, see Flume, *Studien Zur Akzessorietät der römischen Bürgschaftsstipulationen* (1932), pp. 77 ff.

> consulto consilio fecit, licet minori succurratur, ipsi tamen non succurretur.[10]

Where the guarantor knew that he was guaranteeing the debt of a minor he remained therefore bound, notwithstanding the fact that the minor obtained restitution.[11]

This system has been preserved in South Africa. Grotius had written[12]:

> One can be surety not only for obligations which are enforced by the civil law, but also for obligations which are based on natural law only. . . . Thus it may happen that a surety may be legally compellable and the principal debtor not.

Grotius does not specifically mention the case of a minor's transactions. But Voet[13] and van Leeuwen[14] state expressly that a guarantee for the debt of a minor is fully valid and binding. There is no reason to assume that contemporary South African law would make any difference between the guarantee for the debt of a minor of over or under twelve years of age.[15]

The position is similar in Scottish law. Erskine says[16]:

> Fidejussion may be interposed to an obligation merely natural in which the cautioner is effectually bound, though the principal debtor should get free.

Stair[17] has expressly mentioned obligations of minors as an example of the possibility that the principal debtor may not be liable, while the cautioner is bound. It seems likely that this applies only to those cases where the cautioner knew of the

[10] Paul. sent. 1. 9. 6; see also D. 46. 3. 95. 3 (Julian); C. 2. 34. 1 and 2. The Pandectist writers held fast to the view that the guarantor was liable only if he knew that the principal debtor was a minor: see Savigny, *System des heutigen römischen Privatrechts*, Vol. VII, pp. 220 ff., Puchta-Rudorff, *Vorlesungen über das heutige römische Recht* (5th ed. 1862), Vol. II, p. 269.

[11] On the Senatus Consultum Macedonianum and its effects on loans given to a filius familias, see note 27, below.

[12] Inleiding 3. 3. 22; the quotation in the text is from Professor Lee's translation.

[13] 46. 1. 9.

[14] Decker's ed., Vol. II, p. 39.

[15] Nathan, *Common Law of South Africa*, Vol. II (1904), p. 899; Wille, *Principles of South African Law* (1937), p. 337; Wille and Millins, *Mercantile Law of South Africa*, 10th ed. (1941), pp. 274 ff.; see also *Worthington* v. *Wilson*, [1918] T.P.D. 106. Maasdorp, *Institutions of South African Law*, (4th ed.), Vol. II, p. 420, agrees, notwithstanding the erroneous statement that guarantees of natural obligations are invalid in South African Law. Weessels, *Law of Contract*, Vol. II (1937), pp. 1090 ff.

[16] *Principles*, III, 3. 24 (20th ed. by Rankine, 1903), p. 386.

[17] 1. 17. 11, see also Bell, *Principles I*, 251, Gloag-Henderson, *Introduction*, 3rd ed. (1939), p. 197; Wallace and McNeil, *Banking Law*, 7th ed. (1933), p. 271.

minority of the principal debtor. In the only reported case, *Stevenson* v. *Adair*,[18] it was held that a cautioner in an indenture of apprenticeship, entered into by a minor without the consent of his father, was bound in accordance with the terms of his obligation, if the minor deserted the service of his master. The argument used by the Courts was that the cautioner is presumed to know whether or not the principal debtor is a minor and that he must be presumed to have intended to guarantee the creditor against the loss arising to the latter from the principal debtor's use of his right to plead his minority. It will be seen that *Swan's Case* has no bearing on our problem. In *Swan's Case* the transaction that had been guaranteed was illegal. A natural obligation does not arise from an illegal transaction. The difference between *Swan's Case* and *Coutts' Case* was therefore of decisive importance from the legal point of view.

In the majority of the modern European and South American laws the legal position has only slightly changed.[19] Many modern legislators have found the conception of ' natural obligations ' too vague. The consequence is that it has been superseded or—in some laws [20]—supplemented by a more specific rule. A considerable number of modern laws have followed the example of the French Civil Code in providing that the guarantor cannot plead a mere personal inability on the part of the main debtor. A new legislative principle has thus been developed which, it is submitted, incorporates a sound ethical principle. Nobody but the principal debtor himself can benefit by the fact that the principal debtor suffers from a personal disability. The legal provisions relating to personal disabilities are intended for the protection of the person affected by that disability. It follows that others cannot share in this protection. To this extent the rule that the contract of guarantee is accessory to the main contract is inoperative.

There are, of course, many variations in the texts of the statutory provisions in the various individual legal systems. Personal disabilities do not everywhere have the same legal effect. This is responsible for some of these differences. Thus in French law contracts entered into by a minor are only in comparatively rare cases void. In those cases in which the Code does not prescribe the observance of certain forms,

[18] 10 M. 919 (1872).

[19] See for details A. B. Schwarz, *Garantievertrag und Bürgschaft*, in *Rechtsvergleichendes Handwörterbuch*, Vol. III (1931), pp. 593 ff., at p. 605.

[20] *E.g.*, Quebec Civil Code, art. 1932 (2), and Malta Civil Code, s. 1695 (2).

devised in the interest of the minor, the transaction can merely be rescinded. If the minor has been emancipated—which is possible only if he has completed his fifteenth year of life—rescission is only possible if the minor has actually been put at a disadvantage by the transaction. Rescission is a defence which must be pleaded: the fact that the case warrants the assumption that a contract can be rescinded is not sufficient.[21] This explains the wording of section 2012 of the Code Civil:

> A guarantee can exist only in relation to a valid obligation.
>
> It is nevertheless possible to guarantee an obligation although the latter can be annulled in consequence of a defence that is strictly personal to the debtor, as, for example, in the case of minority.

There is no need here to dwell upon the various questions of interpretation, which have engaged the attention of French jurists in connection with this rule. Planiol's verdict [22] that the rule is 'somewhat obscure' is hardly justified. The argument by which the legislator justified it was, that in the cases covered by the rule the guarantee was given for the purpose of protecting the creditor just against the possibility of the debtor pleading his incapacity. There seems therefore little ground for the extensive interpretation favoured by a number of French authorities, according to which the rule applies to every case of a 'natural obligation'.[23] A number of other Codes under the influence of the French Civil Code and its interpreters have, however, paid regard to this interpretation by re-introducing the conception of 'natural obligation' which the French Civil Code had tried to dispense with.[24]

[21] Art. 1123–1125; 1305–1314 Code Civil.

[22] Planiol et Ripert, *Traité élémentaire de Droit Civil*, 11th ed. (1937), Vol. II, 817. Similar criticism by Colin et Capitant, *Cours élémentaire de Droit Civil Français*, Vol. II, 3rd ed. (1921), p. 734: 'La solution de l'article 2012 2e. l. demeure donc une anomalie juridiquement inexplicable'; see also Wahl, in Baudry-Lacantinerie, *Traité théorique et pratique de Droit Civil*, Vol. XXIV (3rd ed., 1907), p. 505. This criticism is largely due to the fact that the legislator justified the rule of art. 2012 by the faulty argument that persons guaranteeing the debts of infants did so for the purpose of securing the creditor against the effects of the plea of minority. The wording, 'Strictly personal to the debtor' is obviously influenced by D. 46. 95. 3. 1 (Papinian): 'si debitor propriam et personalem habuit defensionem'.

[23] See in this sense Wahl, *l.c.* p. 507, Josserand, *Cours de Droit Positif Français*, 3rd ed. (1939), 2nd vol., p. 905. *Contra*, Planiol et Ripert, *Traité Pratique de Droit Civil Français*, Vol. IX (1932), p. 877, Aubry et Rau, *Cours de Droit Civ. Français*, Vol. VI (by Bartin; 1920), p. 219, note 5.

[24] See *e.g.*, above note 20. Particularly characteristic is the re-interpretation of Iranian law in the sense of the governing opinion of French law by an Iranian lawyer, Dr. Ali-Abadi, *Le Contrat de Cautionnement* (Paris thesis, 1938), pp. 88 ff. Other laws which have received the French rule are the Codes of Brazil (art. 1858 (2)), Roumania (art. 1653 (2)), Bulgaria (638), Chile

A difference that is in practice even more important relates to the question whether the guarantor is precluded from pleading the incapacity of the principal debtor in those cases only in which he knew of it when he entered the contract of guarantee, as in *Coutts' Case*, or whether he is precluded even though he did not know of it. The Swiss Code of Obligations (art. 494 (3)) has preferred the first of these alternatives:

> It is possible to guarantee validly for the debt arising from a contract that is invalid on the ground of mistake or because of the main debtor's minority, provided the guarantor knew when entering into the guarantee of the fact vitiating the main debtor's consent.

The same view has been adopted by the Franco-Italian draft Code of Obligations.[25] The Austrian legislator, however, has taken the opposite view (ABGB art. 1352):

> If a person has guaranteed for another person who owing to personal disabilities cannot enter into any liability, he is responsible as a joint debtor, even though he did not know of the disability.

Most of the other Codes fail to mention the problem. French interpreters differ on the point.[26] On principle it appears strange that a guarantor should be liable although he believed himself to be guaranteeing a non-existent debt, while another who believed that he guaranteed a perfectly valid obligation should be free from all liability, merely on the ground that the principal debtor was under some personal disability.

There is one group of laws which allows an exception from the rule that guarantees for the debts of minors are fully valid. In Roman law the Senatus Consultum Macedonianum provided that no action should lie against a filius familias who had borrowed money.[27] A guarantee for a debt barred by the Senatus Consultum was also invalid with the proviso that any money paid by the guarantor under his guarantee could not be recovered.[28] This rule has, strangely enough, survived in a number of contemporary laws, including, *e.g.*, Spanish law (see Cod. Civ. art. 1824)[29]:

(art. 2354), Poland (art. 626), Egypt (see Walton, *Egyptian Law of Obligations*, Vol. I (2nd ed., 1923), pp. 81 ff.).

25 Art. 710 (2).

26 See Planiol et Ripert, *Traité Pratique*, *l.c.*, p. 878, as against Wahl, *l.c.*, p. 505.

27 The wording is given by Ulpian in D. 14, 6, 1, pr. See Buckland, *l.c.*, pp. 425 ff.

28 Marcian, D. 12, 6, 40, pr.

29 Other codes in which the rule has survived are the Civil Codes of Portugal, art. 822 (2); Brazil, art. 1488, 1502 (2), 1529.

> A guarantee cannot exist without an obligation.
>
> It can nevertheless be given for a debt which can be annulled by virtue of a purely personal defence on the part of the main debtor, such as minority.
>
> The rule contained in the preceding paragraph does not apply to the case of a loan given to a filius familias.

Among the very few legal systems in Europe which do not contain any provision corresponding to art. 2012 of the Code Civil is German law. The Prussian Code of 1794 had included a rule similar to that of art. 2012 (see ALR XIV, 1, 254):

> If the main contract is invalid merely because of personal qualities on the part of the debtor, the guarantor is liable as a joint debtor.

According to the interpreters this rule applied whether the guarantor knew of the disability or not.[30] The Prussian Code even contained a survival from the time of the Senatus Consultum Macedonianum in the form of a provision according to which all private debts of students were void and all guarantees for such debts unenforceable.[31] But no trace of these rules can be discovered in the German Code of 1898. The German legislator refused to incorporate a rule validating a guarantee in cases where the principal debtor was under a personal disability. The German Civil Code has placed greater stress on the principle of the accessory character of the guarantee than did the Prussian law and the usus modernus pandectarum. A rule forbidding a guarantor to plead the disability of the main debtor was discussed, but rejected. It was believed that such a rule would endanger the position of the minor—a rash conclusion neither justified by the legal position in those countries where such a rule exists, nor warranted by practical experience. The interpreters of the Code quickly pointed out [32] that a promise to guarantee the debt of a minor given with full knowledge of the main debtor's disability would not have to be considered as void. Such a promise would have to be interpreted as a guarantee or as some other, innominate form of contract. There is no reason to assume that it is void. It is not contrary to the policy of the law. The parties are free to shape their private relations in accordance with their

[30] Dernburg, *Lehrbuch des Preussischen Privatrechts*, Vol. II, 3rd ed. (1882), p. 703.

[31] ALR II, 12, 104. This was abolished by a statutory amendment of the Code in 1879.

[32] Eck, *Vorträge über das bürgerliche Recht*, Vol. I, 1903, p. 567; Enneccerus-Lehmann, *Recht der Schuldverhältnisse*, 13th ed. (1932), p. 609.

own intentions. The rule that a contract of guarantee is accessory to the main obligation is merely of importance for the purpose of the classification and interpretation of individual contracts. A contract, which the parties do not want to depend upon the existence and extent of the principal obligation, is not a contract of guarantee, but there is no reason why it should not be a valid contract. The words which the parties used would not matter, if it were clear in the individual case, that owing to the fact that there was no principal obligation, the parties could not have intended to conclude a contract of guarantee.

It remains to consider whether the acceptance of the rule adopted by the majority of the Continental laws according to which the guarantor cannot plead a personal disability would be possible in English law or whether it would be incompatible with any of the accepted principles of the English legal system. It is submitted that there is no reason why this rule should not be incorporated into English law. 'Infancy is a personal privilege of which no one can take advantage but the infant himself.' This rule from Bacon's *Abridgment*, quoted with approval by modern textbook writers,[33] expresses in the clearest possible form the same legal principle as art. 2012, Code Civil. This principle has even produced some practical consequences in modern English law. It is a recognised rule of English law that directors who have guaranteed an alleged debt of their company are liable under their guarantee even if the company itself cannot be sued, because the principal contract is *ultra vires*.[34] In considering *Coutts' Case* Oliver, J., found it difficult to appreciate the relation between this rule and the principle of the accessory character of the contract of guarantee. He said that he would have been grateful to Mr. de Colyar if, instead of merely stating that directors' guarantees were valid notwithstanding the fact that there was no principal debt owing to the principal contract being *ultra vires*, he would also have stated why this was so. It is submitted that the justification for the rule, which Oliver, J., sought, lies in the principle stated in Bacon's *Abridgment*. Personal privileges prevail only in favour of those whom they are intended to protect. The rule of *ultra vires* constitutes such a privilege. It protects the company,

[33] Cheshire and Fifoot, *Law of Contracts* (1945), p. 262.
[34] *Yorkshire Railway Wagon Co.* v. *Maclure* (1881), 19 Ch.D. 478; *Wauthier* v. *Wilson and Another* (1912), 28 T.L.R. 239; *Garrard* v. *James*, [1925] 1 Ch. 616.

but not third parties. Minority is another personal privilege. It should not protect anybody but the minor.

If this is the correct view, it does not even matter whether or not there is anything in the nature of a 'natural obligation' to support the guarantee. There is no such natural obligation where a company has concluded a contract that is *ultra vires*. Nevertheless the guarantee is fully valid and binding. But it may well be said that the legal position in English law, if an infant has concluded a contract that is covered by the Infants Relief Act, 1874, does not justify the assumption that there is no principal debt that could support a guarantee. Section 1 of the Act states that certain types of contracts are 'absolutely void'. It has, however, long been recognised that this section does not mean what it says. It has been held that an infant who had paid money under a transaction declared 'absolutely void' by the Act and who has received some consideration for what he had paid, could not recover his payments.[35] In support of this decision the Court invoked 'natural justice': the Roman lawyers who spoke of 'natural obligations' used therefore no very different language. Goods delivered to an infant under such a contract pass on delivery. The infant, it seems, can even recover damages for breach of contract though he cannot maintain an action for specific performance.[36] A transaction of this kind cannot, except by an abuse of language, be termed 'void'. Civilian legal theory possesses a term—so far, it seems, unknown to English jurisprudence—which correctly describes the situation: contracts of the kind under discussion are referred to 'negotia claudicantia', *i.e.*, transactions ineffective in some regards, but effective in others. They do not produce all the results which a fully valid transaction produces. But, unlike void transactions, they are not wholly without legal effect. There is, it is submitted, no reason why among the results which such a transaction can produce there should not be the one that is at issue here: that a guarantee can be given in connection with this transaction.

III. Only a few words are required to deal with the argument on principle that was used in *Coutts' Case*. The argument proceeded along the following lines: a definition of guarantee was given; the facts of the present case were compared with that definition; it was found that these facts

[35] *Valentini* v. *Canali* (1889), 24 Q.B.D. 166; see also *Ex p., Taylor* (1856), DeG.M.&G. 257.

[36] Cheshire and Fifoot, *l.c.*; see Lush, J., in *Stocks* v. *Wilson*, [1913] 2 K.B. 235, at p. 246.

did not fit that definition; it was concluded that in the present case there was no valid obligation. The last link in this chain is, of course, a *non sequitur*. But even if we disregard this aspect, the argument is faulty, because it is a misuse of a definition. It constitutes that form of misuse that is commonly characterised as '*Begriffsjurisprudenz*' and whose grave error lies in the overestimation of the value of legal concepts. Definitions may be used to classify existing legal rules. They must not be used for the purpose of forming fresh rules. That is not a modern discovery made by the sociological or any other contemporary school of jurisprudence. It is a principle which already the classical jurists of Roman law recognised. 'Non ex regula ius sumatur, sed ex iure quod est regula fiat.'[37]

The law is a system of rules whose justification lies in considerations of justice, tradition and practicability. Where a new rule must be formed to cover a case for which the system does not yet provide, we may argue from the analogy of existing rules, from arguments of practicability or from those of justice between the parties. But we cannot argue from bare concepts. Concepts are formed to summarise the existing law. *Ex hypothesi* they have therefore nothing to say on the question of the new rule that it is desired to find. It is a valid argument in the present case that guarantees for the debts of minors perform a useful function, because they enable minors to obtain credits which they may require and which they may not be able to obtain without such valid guarantees.[38] This is an argument of practicability to which importance must obviously be allotted. It is a valid argument that justice between the parties in no way justifies either the release of a guarantor who knew perfectly well that he guaranteed for a minor or the disappointment of a creditor who gave credit in reliance on such a guarantee. This is an ethical argument of, it is submitted, some strength. Finally, it is a valid argument that the interests of the minor which the law wants to protect, are not endangered by this solution. This is a systematic argument whose justification lies in the necessity for any legal system to preserve a certain amount of consistency. But there is no room for arguments of a pseudo-logical character, based on mere concepts. Such arguments

[37] D. 50. 17, 1.

[38] See Ehrenzweig, *System des österreichischen Privatrechts*, Vol. II, 2nd ed. (1928), p. iii; see also Guhl, *Schweizerisches Obligationenrecht*, 3rd ed. (1944), p. 340; A. B. Schwarz, *l.c.*; *Schöndorf Einführung in das slavische Recht*, Vol. I (1922), p. 129, note 1.

cannot produce results that are ethically or economically satisfactory. Economically and ethically satisfactory results can be obtained only if ethical and economic arguments are adequately considered.

On the point that has been discussed here, there is practically unanimity among contemporary laws—including the law of the U.S.A., where, however, the argument proceeds on somewhat different lines.[39] It may be hoped that the opportunity may arise for a reconsideration of the rule in *Coutts' Case*.

E. J. COHN.

[39] In the U.S.A. guarantees for the debts of minors are considered as fully valid and binding on the ground that contracts of minors are merely voidable, not void, see Williston, *On Contracts* (1920 ed.), s. 484.

STATUTES

BORROWING (CONTROL AND GUARANTEES) ACT, 1946

THIS is a short Act containing two important contributions to the assumption of economic control by the State.

In the first place, it makes permanent the need for Treasury consent to borrowing and raising of capital introduced as a war-time measure by the Defence (Finance) Regulations. By section 1 the Treasury is empowered to make orders for regulating, subject to such exemptions as may be specified, four types of transactions which embrace any issue in Great Britain or by a company incorporated in Great Britain of shares or other securities, the circulation in Great Britain of any offer of foreign securities, and the borrowing in Great Britain by any person of sums aggregating more than £10,000 in any twelve months. The ambit of the section is wide, and provision is made to catch unit trusts. Provisions for enforcement and penalties are contained in the Schedule, but it should be noted that transactions which contravene the section are not avoided (sub-section (3)). The penalties are severe, and the methods of enforcement stringent, conferring on the Treasury wide powers of securing production of documents and information. It is, however, expressly provided that a counsel or solicitor shall not be required to disclose any privileged communication.

It would be improper in this review to discuss the case for State control of private enterprise as a permanent measure. Nor is it possible to discuss the way in which the Act is likely to work in practice, since it is another example of ' streamlined ' legislation and everything will depend on the orders made under it. At the time of writing, no such orders have been made, and the present position still depends on the Defence (Finance) Regulations and the Capital Issues Exemptions Orders, under which the consent of the Capital Issues Committee has to be obtained to issues, etc., aggregating more than £50,000 in any twelve months. There appears to be no immediate intention of introducing any fundamental changes in the present practice,[1] although the Act enables the Government either to tighten or loosen the control as they wish from time to time. The existing position is certainly not popular

[1] See the Draft Order in the Explanatory Memorandum (Cmd. 6726/46)

in commercial circles, but except for the vexed question of the prohibition of bonus issues it cannot be said that it has proved unduly oppressive. The main disadvantage in the case of public issues has been additional delay, in that it is necessary to comply with a third set of regulations—the three being the prospectus provisions of the Companies Act, the Stock Exchange Regulations, and now the Treasury Regulations. The smaller private companies and individual traders have been very little affected. The reaction to permanent control in the future will depend on how it is exercised, *i.e.*, on the instructions given by the Treasury to the Capital Issues Committee and on how the latter carries them out. The control of ' private ' borrowing might also become oppressive if the £10,000 limit mentioned in the Act were in fact reintroduced in place of the present limit of £50,000, though it should be noted that the Act expressly excludes borrowings from bankers in the ordinary course of business.

Section 2 of the Act is less controversial; it enables the Treasury to guarantee (up to an aggregate of £50,000,000 in any financial year) loans for facilitating the reconstruction or development of industry. While, therefore, under section 1 the Treasury is empowered to restrain private enterprise, under section 2 it can aid it by backing the loans which it needs.

The Act does not extend to Northern Ireland, but the Parliament of the latter is expressly empowered to make laws for similar purposes.

ROYAL COMMISSIONS ETC.

ROYAL COMMISSION ON AWARDS TO INVENTORS

A Royal Commission on Awards to Inventors was set up by Royal Warrant of May 15, 1946, published in the *London Gazette* of May 17, 1946, p. 2349. The terms of reference, the rules of procedure and general instructions to intending claimants are contained in a leaflet issued in August, 1946, obtainable from H.M. Stationery Office or from the Secretary of the Commission at Somerset House, Strand, London, W.C.2.

The function of the Commission is to settle awards to be made by the Crown to inventors whose inventions, patents, designs, drawings or processes were used by the armed forces, the supply departments, Government contractors or by Allied Governments during the 1939–1945 war.

This task is being entrusted to a special Commission because the number of patented inventions used by the Crown during the war is so large that the ordinary peace-time procedure under section 29 of the Patents Act would probably be unworkable. Moreover it appears fair that inventors and owners of designs, drawings, secret processes, etc., which are unpatentable or for which in fact no patent was taken out by the inventor, should receive some remuneration if their inventions were used by the Government for the purpose of winning the war; in other words the inventor has just as much right to compensation for the use of his property for war purposes as the owner of a house or a factory requisitioned under the Defence Regulations.

The Commission can make awards under four heads, *viz.*:—

(1) For the use of a patented invention or a registered design. In this case the Commission undertakes the functions ordinarily exercised by the Court under section 29 of the Patents and Designs Acts, 1907–1946.

(2) For the use of an invention or design where the Treasury requests the Commission to assist in the completion of pending negotiations.

(3) For the use of unpatented inventions, designs, drawings or processes which are of exceptional

utility or otherwise appear to entitle the inventor or owner to some remuneration.

(4) For the use of an invention, discovery or design by the United States Government under the British-U.S. Agreement concerning the Interchange of Patent Rights of March 27, 1946.

The Warrant of May 15, 1946, creating the present Commission is similar to the Warrant of March 19, 1919, with subsequent amendments, which created a Royal Commission on Awards to Inventors whose inventions had been used during the 1914–1919 war. Some of the principles governing the awards of the 1919 Commission are contained in the seven reports presented by the Commission to Parliament during the period 1921 to 1937 and in a 'Statement of the Principles Governing Assessment of Compensation adopted by the Royal Commission on Awards to Inventors' published by the Treasury Solicitor in December, 1929, reprinted in August, 1946, and obtainable from H.M. Stationery Office (Code No. 73–16). The present Commission is in no way bound by any precedents laid down by the 1919 Commission but will probably have regard to a number of the principles and to the policy adopted by the previous Commission.

The 1919 Commission completed its task in 1937. It dealt with approximately 1,800 cases, of which by far the largest number were brought under head (3) in respect of unpatented inventions. The total amount awarded was approximately £1,500,000. One of the largest individual amounts awarded for one invention was £110,000 for an aeroplane engine. A considerable amount of compensation to inventors was paid direct by the Treasury or the Government departments concerned without reference to the 1919 Commission.

If an invention is patented a claim for an award will usually be made under head (1). The claimant must, however, first submit his claim to the Government department concerned (Procedure Rule No. 1). If no direct settlement can be reached and the department agrees, the claim will be heard by the Commission. If the Crown disputes the infringement or the validity of the patent owing to lack of novelty, lack of utility, lack of an inventive step, insufficiency of description or any other of the numerous grounds listed in section 25 (2) of the Patents Act the Commission will not normally deal with the matter but leave it to the patentee to take his case to the ordinary Courts. The patentee may, however, elect to

abandon his patent rights and ask the Commission for an *ex gratia* award under head (3).

In the case of an application under head (1) the patentee has a statutory right to remuneration against the Crown under section 29 of the Patents Act. The mere use of the invention by the Crown or a Government contractor, with or without knowledge of the patent, entitles the patentee to compensation. Any sum awarded under head (1) is subject to income tax, in the case of an individual inventor possibly to surtax, and in the case of a company or firm to excess profits tax. In the case of *Constantinesco* v. *R.* (1927), 43 T.L.R. 727, an award of a lump sum under head (1) by the 1919 Commission was held to constitute income under the Income Tax Act, 1918. Even if an award of a lump sum under head (1) by the present Commission were to be considered as receipt of a capital sum it would be liable to tax under section 37 of the Income Tax Act, 1945.

Applications by the Treasury under head (2) for assistance in the completion of pending negotiations are likely to be infrequent.

In the case of an application under head (3) the inventor has no statutory or legal right to an award but ' merely seeks for the exercise in his favour of the bounty of the Crown '. Under this head the Commission can only make a recommendation to the Treasury as to the remuneration (if any) that is proper to be allowed to the inventor, but in practice this recommendation will be acted upon by the Treasury. The inventor must show that his invention was of exceptional utility or that there are other special circumstances owing to which he deserves remuneration. According to the principles established by the 1919 Commission the inventor should prove that the idea of his invention was not merely a general suggestion but was reduced to a practical working shape and caused or contributed to the use of the particular invention by the Crown. It is thought that an award under head (3), being an *ex gratia* award, is not subject to income tax, surtax or E.P.T., but the Commission will not express any opinion on this point.

Regarding the amount to be awarded to an inventor, it is evident that he cannot exploit the needs of the nation by insisting on an extortionate price for the use of the invention, even if patented. On the other hand, it would be unfair that the Crown should be enabled to use an invention at an inadequate price on the ground that Government Departments were

the only possible customers (Principle 8 of the 1919 Commission). Usually the proper award will be equivalent to a fair and reasonable royalty as it would be agreed upon between a willing licensor and a willing licensee bargaining on equal terms (Principles 8 and 9 of the 1919 Commission). The reward may be reduced if the inventor was a member of the armed forces or a servant of the Crown, or if the claimant was a Government contractor and made a profit on the supply to the Crown of articles embodying the invention, or where there is doubt as to the validity of the patent (Principles 11–17 of the 1919 Commission).

Particularly under head (3) concerning unpatented inventions, the 1919 Commission considered it appropriate to take into account all the circumstances of the case, including the extent of the use, the importance and difficulty of the problem to be solved, the time and effort extended in the solution, the inventive merit displayed, etc. (Principle 37). 'A broad, general, untechnical method of dealing with the discretionary task of determining the award' appeared indicated to the 1919 Commission (Principle 38) and will probably be applied by the present Commission.

Under the present Warrant the Commission can make awards only for the use of an invention which has taken place during the 1939–1945 war. Use of inventions, patented or otherwise, by the Crown in peacetime is likely to increase in frequency, especially if more industries are to be nationalised. It may therefore be desirable to extend the functions of the Commission to the making of awards for the use of inventions by the Crown generally, war or no war. On the other hand, any development whereby the decision of patent infringement cases as between private persons or firms would be entrusted to the Commission or any like tribunal is to be deprecated; all such litigation should be concentrated in the hands of the Courts staffed with permanent independent Judges. Many defects in the present system of patent litigation could, however, be remedied if the Courts were freed from the fetters of rigid adherence to precedent and were enabled to perform their function more in conformity with the 'broad, general, untechnical methods' which were evolved by the 1919 Commission and will no doubt be further developed by the present Commission.

PETER MEINHARDT.

SECOND INTERIM REPORT OF THE COMMITTEE ON PROCEDURE IN MATRIMONIAL CAUSES

(*Cmd.* 6945/46)

The Denning Committee, continuing to grapple with their task with the urgency which it undoubtedly deserves, have followed up their first interim report (noted in our previous number) with a second, presented early in November. Its recommendations are perhaps less spectacular than those in the first report and have attracted less public interest. Nevertheless, the ultimate public benefit that is likely to be derived from them is as great, if not greater.

The report is in two parts, the first of which deals with jurisdiction. The Committee specifically reaffirm the principle stated by the Royal Commission of 1912 that 'the gravity of divorce and other matrimonial cases, affecting as they do the family life, the status of the parties, the interests of their children, and the interest of the State in the moral and social well-being of its citizens, makes it desirable to provide, if possible, that even for the poorest persons these cases should be determined by the Superior Courts of the country, assisted by the attendance of the Bar, which we regard as of high importance in divorce and matrimonial cases, both in the interest of the parties and in the public interest'. The difficulty is to maintain that principle, as there are not enough High Court Judges to deal with the increased number of cases. Attempts at decentralisation have not been wholly successful since, although the work done by district Registrars has succeeded, the trial of divorce cases as part of the existing assize system has been a failure. Moreover, trial by a Judge of the Divorce Division proceeding round the country, although it has solved many difficulties in the provinces, has added to the difficulties in London.

The solution recommended is the same in principle as that proposed by the 1912 Commission, namely, that the services should be enlisted of an already available source of extra Judges—those of the county court. All these should be appointed Commissioners for matrimonial causes. The exclusive High Court jurisdiction should be maintained (but undefended divorce cases should no longer be tried by Judges of the King's Bench Division as part of the ordinary work of assizes), and divorce cases should be heard in London and at selected centres in the provinces at places where there is a District Divorce Registry. When County Court Judges are

sitting as Commissioners they should be robed, paid and addressed as High Court Judges, and should have all the jurisdiction of the latter although they should concentrate mainly on undefended cases. Similarly, district Registrars should have the full powers of a Registrar of the Divorce Registry.

These recommendations will meet with general approval as a practical solution of the grave problem of delay, and by increasing decentralisation they will in themselves reduce expense (a matter which is dealt with further in Part II of the report). It has been announced (*The Times*, November 13, 1946) that they have been accepted and are to be put into immediate effect, which can be done without legislation. They should result in an early diminution in the present arrears, since the Committee estimate that the decrease in the volume of county court work (which will be accentuated when workmen's compensation cases are removed from them under the National Insurance (Industrial Injuries) Act, 1946) will enable County Court Judges alone to dispose of 28,500 divorce cases a year.

The only respect in which criticism seems possible is in the Committee's endorsement of the 1912 Commission's insistence on the exclusive right of audience of the Bar. It would be interesting to know what new evidence was received on this point, since it is not believed that the bulk of the profession would consider that representation by counsel should be compulsory, at any rate in undefended cases. The Committee admit that this is one of the main reasons for the excessive cost of divorce, and they express the hope that fees will be reduced and fixed not by rule of thumb but proportioned to the difficulty of the case, the means of the parties and the standing of counsel engaged. They also admit, both impliedly by their recommendations and expressly (paragraph 7 (ii)) that divorce work does not demand any specialised knowledge. In these circumstances the only grounds for the maintenance of the Bar monopoly appears to be the laudable desire to maintain the care and dignity of High Court proceedings in order to emphasise to the parties the importance of the marriage tie. But the distinction between the two branches of the profession is not one that the man in the street appreciates, and it is not believed that he would regard the dignity of the proceedings as in any way impaired because he was represented by a robed solicitor instead of a barrister—the only apparent difference would be the absence of the wig! The writer, as a

solicitor, feels some diffidence in arguing for a reform which would rob the Bar of a monopoly of the only branch of High Court work which is at present booming, but he must make it clear that he does not believe that it would result in any increase in the solicitor's profit costs and that he only takes the point because he genuinely believes that it is demanded in the public interest as the only method whereby costs can be substantially reduced without a complete overhaul of the substantive law as well as the law of procedure. The view of the Committee on this point has subsequently been supported by the President, Lord Merriman, in the debate in the Lords, but it is hoped that it is unnecessary to convince our readers of the lack of justification for his opinion that the standard of honour among the lower branch of the profession falls short of that of the Bar (*The Times*, November 29, 1946, and see also the letter of reply by the president of the Law Society in *The Times*, December 3, 1946). It is hoped that the Committee will give further consideration to this point and that at any rate they will elaborate their reasons for rejecting it.

In order to reduce the present excessive costs of divorce proceedings (of which the minimum in undefended cases is £70), and to reduce delay still further the Committee have carried out a detailed examination of all the procedural steps and have recommended nearly fifty separate reforms. It is impossible and unnecessary to refer here to all of these, suffice it to say that they deal with every stage of the process and that most of them will meet with universal approval from the profession as removing entirely unnecessary technicalities.

Among the more important or controversial suggestions are the following:—

1. *Proof of Service.* Hitherto the need for personal service and strict proof of it has been a troublesome and expensive formality. The Committee recommend that service should be permitted by registered post and that return of a signed acknowledgment should be sufficient proof of service.

2. *Notice to Appear and Entry of Appearance.* The Committee recommend that all formality involved in an 'appearance' should be abolished, and they draft an amended form of notice to appear and of appearance which would be an acceptance of service and would disclose whether the person served desired to defend or to be heard and would include an address for service.

3. *Medical Inspection in Nullity Cases.* The Committee

rightly characterise the expense of medical inspection and evidence as excessive, and suggest that where the petitioner has already been examined by his own medical adviser the report of that adviser might suffice unless the Court should otherwise order, that in any event inspection by one doctor should suffice unless either party should ask for two, and that his report should be admitted without the necessity of calling him as a witness. Most of these suggestions will not arouse any controversy, but it will be interesting to see if the Courts will be prepared to accept the evidence of a party's own medical practitioner in lieu of an independent report.

4. *Evidence.* The Committee consider that more use should be made of affidavit evidence and of signed statements, and they suggest a number of cases in which each should be admitted without leave. Of these perhaps the most important is affidavit evidence from a hotel official, who simply produces the hotel register, identifies the bill, and says that the room occupied was a double room. At present the obtaining of hotel evidence is troublesome and expensive. The hotels, not unnaturally, resent the strain on their understaffed resources of searches through registers and of the constant absence of officials called to give evidence. Hence the objectionable practice has grown up of their refusing to permit any investigation until a generous fee is paid, the ' official ' hotel fee often having to be supplemented by an additional solatium (to use a charitable word) to the manager or other official personally. It is feared that these distasteful practices will not be entirely eradicated as a result of the Committee's recommendations, but they should be reduced as the main hardship to the hotel (the absence of staff at the Law Courts) will have been minimised.

5. *Miscellaneous.* Among the many other recommendations are those for the removal of a number of unnecessary affidavits, for permitting all claims to be included in the petition, for the fixing of days for the hearing of undefended cases and so far as possible for defended cases, for permitting a respondent wife to claim maintenance in discretion cases without leave, and for the repeal of the rule that decrees absolute are pronounced in open Court.

The Lord Chancellor has announced that the recommendations in Part II of the report are being studied by the President of the Division before it is decided on their implementation (*The Times*, November 13, 1946). It is to be hoped that before this appears in print the bulk of them will have

been put into force, for there can be no doubt that procedural reforms are urgently needed. It should be noted that they can all be introduced by Rules of Court, a fact which lends emphasis to the criticism of the inactivity of the Rules Committee made in our note on the first interim report. It is interesting to observe that the report points out that the present rules appear to ignore completely the effect of the Evidence Act, 1938, but apart from this it is surely the function of the Rules Committee to remove obvious anomalies and expensive technicalities without waiting for another Committee to draw attention to them? On this point, too, we have the misfortune to disagree with the President, who in the debate already referred to pointed out that no one reading the report 'would realise that there had been a complete revision and simplification of the whole procedure and practice of the Division' in 1937 and a further revision in 1944. With this we agree, but, unlike the President, we think that they would be right. On the meaning of 'complete revision' we prefer the views of the Committee to those of the President.

The Committee indicate that they have further proposals which will require legislation and which they reserve for their final report. It is understood that these relate particularly to machinery for reconciliation.

NOTES OF CASES

RENT RESTRICTION ACTS—FURNITURE AND SERVICES

THE complementary decisions of *Palser* v. *Grinling*, [1946] 2 All E.R. 287 and *Property Holding Co.* v. *Mischeff*, *ibid.* 294, together constitute perhaps the most important judicial ruling yet given on the Rent Acts. An immediate comment on them is therefore necessary even although one or other is going to the House of Lords.

The joint effect of section 3 (2) (*b*) of the Rent Act, 1939, and section 10 of the Act of 1923 is to exclude from the operation of the Acts 'any dwelling-house *bona fide* let at a rent which includes payment in respect of . . . attendance or the use of furniture, provided that the value which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent'. Where this exclusion applies the tenant has none of the rights afforded by the Acts and his sole protection is that provided by the Furnished Houses (Rent Control) Act, 1946, assuming that this Act has been extended to the district concerned.

In these two cases the Court of Appeal had and accepted the opportunity of construing the statutory provision and in particular of deciding the meaning of 'attendance', 'furniture' and 'substantial portion'. Briefly, the effect of their decisions is as follows:—

1. Where the rent or rateable value of the dwelling-house is such as to bring it *prima facie* within the operation of the Acts the burden of proof is on the landlord to show as a question of fact, (a) that it is *bona fide* let at a rent which includes payment for attendance or furniture, and (b) that such payment constitutes a substantial portion of the whole rent.

2. The only attendance and furniture to be taken into consideration for this purpose is that to which the tenant has a contractual right.

3. If the value to the tenant of the attendance or furniture is not less than 20 per cent. of the total rent it will be deemed to constitute a substantial portion, if less than 15 per cent. it will not, and if between 15 per cent. and 20 per cent. it will be a borderline case to be decided on the particular facts.

4. Deduction of rates payable by the landlord should *not* be made from the total rent before the above proportions are calculated.

The above statements are supported by the decisions in both *Palser* v. *Grinling* and *Property Holding Co.* v. *Mischeff*. Thereafter, however, they part company since the former was concerned with the meaning and valuation of 'attendance', and the latter with the meaning and valuation of 'furniture'. There was consequently no actual decision on the position where there is both attendance and furniture, but presumably in such circumstances proposition 3 (above) will depend on the total value of the attendance *and* the furniture. If, therefore, the value of the attendance is 10 per cent. of the total rent and the value of the furniture 12 per cent., the Acts will be excluded since the value of both together amounts to more than 20 per cent.

As regards the meaning of 'attendance', the Court was unfortunately content to cite previous authorities on what did and did not constitute attendance rather than to define the word itself. Thus they agreed that the provision of hot water and central heating was not attendance (*Wood* v. *Carwardine*, [1923] 2 K.B. 185), nor was the keeping clean of parts of the building not demised to the tenant, *e.g.*, the common entrance hall and staircase of a block of flats (*King* v. *Miller*, [1922] 2 K.B. 647). On the other hand, the provision of the personal services of a porter for carrying up fuel and the removal of refuse would be attendance (*Nye* v. *Davis*, [1922] 2 K.B. 56), and so of course would be the keeping clean of the demised premises themselves. In so far as one can deduce a principle from these examples it seems to be that attendance must be the provision of services to the tenant on the demised premises by a human attendant, as opposed to the provision of services through a mechanical contrivance or not on the demised premises (see in particular the remarks of Asquith, L.J., at p. 294). Thus the provision of a porter to carry down refuse would be attendance, but the provision of a goods lift for this purpose would not; and the provision of a porter to collect the tenants' post would only be attendance if he then delivered it to the tenant (*ibid.*).

Having ascertained whether any of the services which the landlord is bound to supply constitute 'attendance' the next step, according to the Court, is to decide the amount of the rent fairly attributable to this attendance 'regard being had to the value of the same to the tenant'. It is fair to assume

that the landlord has passed on to the tenant the cost of supplying attendance to the demised premises. But in the case of a block of flats the difficulty is to determine what proportion of the total cost of porters and the like is attributable to each flat. The method suggested by the Court is as follows:—

1. First ascertain the total annual cost as at the commencement of the lease to the landlord of providing the necessary employees.

2. Then deduct the cost of all services which do not constitute 'attendance' or for which the tenants have no contractual right.

3. From what remains deduct also the value of these services to the landlord as opposed to the tenants. The removal of refuse, for example, may be of benefit to the landlord as well as to the tenant and this must be taken into account.

4. Then split up the remainder among the individual tenants. It is suggested that the fairest method of doing this would normally be to count the number of rooms, disregarding bathrooms, in each flat and thus to attribute twice as much to an eight-roomed flat as to a four-roomed one.

5. Finally adjustments must be made if there are any special circumstances providing grounds for attributing more or less to one flat than to another. Thus, if when negotiating the tenancy one tenant told the landlord that he would not require the carrying of coals as he proposed to fit electric fires, this might be a ground for treating the agreement to carry fuel as valueless to that particular tenant. But the mere fact that the tenant does not actually take advantage of some agreed service is not in itself sufficient to justify treating that service as valueless to him, and in all cases the burden is on the tenant to show that less than his arithmetical proportion of the cost should be attributed to him (observations of Lord Greene, M.R., in *Engvall* v. *Ideal Flats*, [1945] 1 All E.R. 230, at p. 234, explained).

6. The result expressed in pounds, shillings and pence will be the value to the tenant and whether this constitutes a substantial part of the whole rent will depend, as previously stated, on whether it is 20 per cent. or more or is less than 15 per cent.

So much for *Palser* v. *Grinling* and attendance.

The valuation of furniture, with which the *Mischeff Case* was mainly concerned, raises rather different problems. The method here suggested is:—

1. First ascertain the capital value at the commencement of the tenancy of the furniture in the house or flat concerned. Henn Collins, J., in the Court below had appeared to suggest that the value should be taken as at the date of the action. This meant that a tenancy might start uncontrolled and then become controlled owing to depreciation of the furniture, or might start controlled and subsequently become uncontrolled owing to an increase in value! Happily this suggestion is explained away and it is declared that no account should be taken of any rise or fall in value since the commencement of the tenancy.

2. No regard should be paid to the value of furniture except that in the particular house or flat; not, for example, to any furniture in the common entrance hall, passages or staircase.

3. Fixtures such as fitted and built-in cupboards and wardrobes are to be included as furniture.

4. Then consider what percentage of that capital value is to be regarded as the rent fairly attributable to the furniture, taking into account loss of interest by the landlord, depreciation, and, as the Court said rather vaguely ' any other matters which he (the Judge) thinks it proper to take into account '. The proportion may well vary with the type of furniture concerned. In *Maddox Properties, Ltd.* v. *Klass*, [1946] 1 All E.R. 487, Denning, J., had taken 20 per cent. for ordinary furniture, 10 per cent. for fixed cupboards, and 15 per cent. for a refrigerator and cooker, and in the Court below Henn Collins, J., had taken 15 per cent. for floor-coverings, a built-in kitchen cabinet, a refrigerator, a fitted medicine chest and two mirrors. The Court described these assessments as ' on the high side '.

4. Once again, the value will constitute a substantial portion of the total rent if it is not less than 20 per cent., will not if it is less than 15 per cent., and may or may not if it falls within the 15–20 per cent. borderline.

It should noted that despite these elaborate and helpful rulings, both decisions are almost entirely concerned with guidance on matters which are declared to be questions of fact and do not lay down binding rules of law. There is no doubt, however, that they will be welcomed and followed by County Court Judges and by lawyers called upon to advise

in these cases. The decisions may be said to illustrate both the strength and the weakness of the English judicial system. They illustrate its strength because they show how judicial decisions can interpret a statute in a manner and with an attention to detail that would be quite impossible in the statute itself. Its weakness is illustrated by a further example of the reluctance of the Bench to introduce the maximum possible certainty into their interpretations and to avoid awkward points by dismissing them as questions of fact. Why, in particular, having gone so far should they have insisted on leaving undecided the borderline between 15–20 per cent.? It is easy to understand that the facts of each particular case will have to be taken into consideration in deciding on the actual value of the attendance or furniture, but once that has been decided it is difficult to see why 17 per cent. of the total rent should be *substantial* in one case and not in another. However, the Court of Appeal refused to lay down a hard-and-fast rule and lawyers will therefore have to advise their clients that in such cases the odds are evens. It is to be hoped that the House of Lords will have the courage to eradicate this entirely unnecessary element of uncertainty; they need not fear that they may be laying down too *hard-and-fast* a rule for there will always remain sufficient elements of uncertainty to maintain flexibility—if, indeed, it is flexibility and not certainty that is required in these cases.

Another respect in which it is submitted that the House of Lords might amend the judgments is in connection with the ruling that built-in wardrobes, cupboards and the like are to be treated as furniture. It is thought that when the Legislature used the word 'furniture' they were thinking of movables added to the accommodation and not to immovable amenities forming an integral part of it. In this respect the decisions seem unduly to favour the landlord, but in other respects they are undoubtedly unduly harsh on him. This is so mainly in connection with the restricted interpretation given to the word 'attendance' and to the exclusion of hot-water and central heating services. It is here that landlords' expenses have risen so enormously and there is no doubt that increases in rent should be permitted to cover at any rate some part of these increased overheads—the Ridley Committee recommended this (Cmd. 6621/45, para. 81), and the Furnished Houses (Rent Control) Act makes provision for it in cases covered by that Act. But to remove the

tenancy from control under the Rent Acts on this ground is equally unfair to the tenant because, unfortunately, some landlords cannot then be trusted to limit increases in rent proportionately to their increased costs. The Furnished Houses Act may afford some protection but this is inadequate since it does not give sufficient security of tenure, and landlords therefore can, and do, restrain applications under the Act by threatening eviction.

By and large, however, the judgments of the Court of Appeal seem to be as equitable to both sides as is possible in the present state of the legislation. But justice to neither landlord nor tenant can be done until the present statutory anomalies are removed—the chief anomaly of course being the tying of the rent to a standard based not on values but on the rent at which the individual dwelling-house happened to be let on an arbitrary date. As a result it is by no means uncommon to find identical accommodation in neighbouring premises or even in the same block of flats with widely different controlled rentals, and this causes ill-feeling between landlord and tenant and between one tenant and another. While these absurdities remain the judiciary is powerless to do more than clarify isolated points in the way that the Court of Appeal has now done. Only the Legislature can deal with the root of the trouble.

L. C. B. G.

STARE DECISIS

Fitzsimmons v. *Ford Motor Co.*, [1946] 1 All E.R. 429, and *Wilson* v. *Chatterton*, [1946] 1 K.B. 361, both decisions on the Workmen's Compensation Acts, afford striking instances of the difficulties that arise when a Court is faced with a previous decision that it now wants to avoid.

In *Fitzsimmons' Case* the point at issue was whether a workman, whose job compelled him to hold in his hand an electrically operated fettling machine that oscillated at 2,800 revolutions per minute, had met with 'an injury . . . by accident', when he contracted Raynaud's disease as the result of cumulative damage to the tissues of his hand from the machine's vibrations. Following *Burnell* v. *Selvage*, 14 B.W.C.C. 158 (H.L.), the C. A. held that the employer was liable, but to arrive at this result it was necessary to ignore three of its own previous decisions, none of which was considered, much less expressly overruled, by the Lords in

Burnell v. *Selvage*. As Scott, L.J., observed ([1946] 1 All E.R. at p. 431), the point first arose in *Steel* v. *Cammell*, [1905] 2 K.B. 252, when it was decided in favour of the employer; when it was next before the Court in *Williams* v. *Guest Keen*, [1926] 1 K.B. 497, the C. A. merely followed its own earlier decision in *Steel's Case*; and on the last occasion, in *Cole* v. *L. N. E. Ry.*, 21 B.W.C.C. 87, the C. A. merely applied its own decision in *Williams' Case*. Where a decision given forty years ago has been followed without question in the only similar cases that have come before the Court, it has hitherto been usually regarded as settling a point beyond argument; and even the Lords have until recently hesitated to overrule a decision that has been regularly applied and acted on by lower tribunals for many years.

In *Wilson* v. *Chatterton* the C. A. also ignored a previous decision of its own. There, a County Court Judge had refused to make an award in favour of the widow of a deceased workman who, a known epileptic, had been found drowned in a field to which his work had taken him. There was no other evidence and *Lander* v. *British United Shoe Machinery Co. Ltd.* (1933), 102 L.J.K.B. 768, which was indistinguishable on the facts, seemed to conclude the matter. However, the C. A. had obviously felt uncomfortable about *Lander's Case* and in two very similar cases (*Martin* v. *Finch*, 156 L.T. 447, and *Ironmonger* v. *Vinter*, 31 B.W.C.C. 90) they had been at pains to distinguish it on very slender factual differences. So it had never been 'received' without question in the way that the point now overruled in *Fitzsimmons' Case* had and the C. A. was able to rely on a general principle ('unless the weakness or illness of the workman is the sole cause . . . the employer is liable') that it deduced from four decisions of the Lords, three of which were given, it is pertinent to note, before *Lander's Case*, though none was cited therein (see [1945] K.B. p. 367).

But the method by which the C. A. arrived at this principle is a little startling. Firstly, it is deduced from four previous decisions of the Lords, none of which was decided on facts similar to those in the instant case and in none of which the principle was expressly formulated. Then a rule of construction is prayed in aid on the authority of Lord Loreburn: 'We ought not to read into (an act) an exception without bearing in mind the nature of the remedy which is proposed by the act itself' (cited, [1946] 1 K.B.

p. 365). This left the C. A. free to find ' the natural meaning of the positive words ' in section 1 (i) W. C. A. 1925. All this is little more than a polite and rather circuitous way of saying the Court has changed its mind. It savours, almost, of *libre recherche scientifique*.

Both decisions exemplify a new boldness in the approach to precedent. There has, I think, been in recent years much less respect shown on the bench for older and now inconvenient decisions which, in Dr. C. K. Allen's phrase, tend to ' go off ' and to do so nowadays with surprising rapidity. The Lords set the example when, in the *Fibrosa Case*, [1943] A.C. 32, they overruled a decision that had stood since 1904. The Court of Appeal followed suit in *Young* v. *Bristol Aero Co.*, [1944] K.B. 718 when, while affirming the rule that they are bound by their own previous decisions, they adumbrated three wide and elastic exceptions in which they were ' bound ' to disregard such decisions. Using this new freedom the C. A. has ignored its own earlier decisions in both the cases that prompted this note; and also in *Fisher* v. *Ruislip Northwood U. D. C.*, [1945] 1 K.B. 584, where three recent decisions (to all of which MacKinnon, L.J., also a member of the Court that decided *Fisher's Case*, had been a party) were reversed in terms. In all these matters justice may have triumphed over elegance and the flexibility of the doctrine of precedent been reasserted, but there has also been, it is submitted, a considerable inroad into the rule of *stare decisis* as it has been usually understood.

G. A. Forrest.

PUBLIC OFFICERS—CONTROL OF—DISCRETION BY MINISTER

Simms Motor Units, Ltd. v. *Minister of Labour and National Service*, [1946] 2 All E.R. 201.

The question of discretion is one of the most difficult and important aspects of Administrative Law. Most of the existing doctrines which the Courts have laid down concern the discretionary powers of Ministers, local authorities or licensing bodies in relation to outside interests. This case turns essentially on the relation between a Minister and certain officers of his Department occupying a special position of independence and the extent to which he is required to recognise the independent status of such officers. It is true that the case was raised on the complaint of an outside interest, but the real significance of the decision is its

application to the internal organisation of Central Government Departments and the distribution of powers within them. It has special implications in the field of administrative justice.

For some time there has been a tendency for specially designated officers to be named in statutes and statutory rules and orders. There are, for example, marine superintendents appointed under the Merchant Shipping Acts, insurance officers appointed under the Unemployment Insurance Act, factory inspectors under the Factories Act, etc. It has not hitherto been clear whether such officers are merely a special type of civil servant, amenable in all respects to the discipline and control of the Department in which they serve, or whether they occupy a more independent status which would make them resemble to some extent the public officers who were responsible for administering many of the functions of government, both central and local, in the eighteenth and early nineteenth centuries. The public officer has never completely disappeared. The coroner, the sheriff and the clerk of the peace are obvious instances which still survive; but the older type of public officer has long been overshadowed by the modern civil servant. The public officer, as Blackstone explains, is known to the law not merely in the sense that his office is recognised but also he himself is known to the law by name. The law speaks directly to him and he is personally clothed with duties, powers, responsibilities and obligations. The civil servant, by contrast, is scarcely known to the law: he is merely one of the officers or servants whom the Minister is authorised to appoint. It is the Minister who possesses the powers which are wielded by civil servants on his behalf and it is his discretion which they exercise. It has seemed, however, that the recent tendency to which reference has been made above has created a new intermediate class of officials who, although technically civil servants, nevertheless possess some of the attributes of public officers. This suggestion appears to be borne out by the *Simms Case*.

Under Defence Regulation 58A the Minister of Labour and National Service was given extensive powers to direct persons to perform work of various kinds and to control the work, movements and dismissal of persons engaged in essential work. The regulation provided that an order made under it might deal with the dismissal of persons employed in undertakings engaged in essential work. The Defence Regulation, although giving very wide powers to the Minister, required

that they should be exercised by Order. Another point to be noted is the definition of a National Service Officer which is contained in Defence Regulation 100. This states that a National Service Officer means ' any officer authorised in writing by the Minister of Labour and National Service to give directions under regulation 58A . . . on his behalf and in accordance with his instructions '.

In pursuance of these powers the Minister made the Essential Work (General Provisions) (No. 2) Order, 1942, and a number of amending orders. These orders provided that if a specified person to whom the Essential Work Order applied was dismissed from his employment on the grounds that he had committed serious misconduct he could request the National Service Officer to submit the matter to a local Appeal Board to be constituted by the Minister. The National Service officer had then a duty to submit the matter forthwith to the Board, which after hearing the application would make whatever recommendation to the officer it should think fit. The decision of the local Appeal Board was advisory only. By article 5 (3) of the Order a National Service Officer ' after considering any such recommendation as aforesaid may . . . direct the reinstatement of a specified person who has been dismissed on the ground of serious misconduct if the board is of opinion that the dismissal was not justified on that ground, or, in the last-named case, without giving a direction to reinstate give notice to the person carrying on the undertaking and to the specified person that the board is of the above opinion '. The dismissal of a specified person for serious misconduct was thus, in the first instance, only provisional and if he exercised his right of appeal to a local Appeal Board and a National Service Officer so decided, the dismissal was to be treated as ineffective. On the other hand if the workman omitted to have his case referred to the Appeal Board, or if the National Service Officer decided not to direct his reinstatement, the dismissal was treated as operative.

In the *Simms Case* a workman named D. H. McGregor was dismissed by the firm for alleged serious misconduct. He complained to the National Service Officer and his appeal was referred to the local Appeal Board which certified that in their opinion the dismissal was not justified on the grounds of serious misconduct. The National Service Officer thereupon notified Simms Motor Units and required them to

reinstate McGregor in their employment as a machinist. The respondent firm refused to reinstate McGregor. They were in due course summoned before a Court of summary jurisdiction and fined. They appealed to quarter sessions which allowed the appeal and the case came on a case stated to a Divisional Court of the King's Bench.

Messrs. Simms stated that they had failed to comply with the requirements of the National Service Officer for two reasons: (1) that they had no work available for him at the time; (2) that the direction issued by the National Service Officer requiring his reinstatement was invalid because the officer had not exercised his discretion under the powers conferred upon him by the Defence Regulations and the Essential Work Order. The Court found that work was, in fact, available for McGregor and we may therefore disregard the first of these contentions. In amplification of the second ground of appeal, the respondents pointed out that the Minister had given instructions to the National Service Officer to follow the recommendations of the local Appeal Board in misconduct cases whenever the recommendation was unanimous and the dismissed workman desired to be reinstated. A finding that this had actually occurred in the present case was made by quarter sessions and the High Court dealt with the case on that basis.

The Divisional Court took the view that the Essential Work Order gives the National Service Officer a discretion and requires him to exercise it. If the Minister were permitted, as he had, to instruct the National Service Officer not to exercise his discretion in certain circumstances he would in effect alter the construction of the Order. The view taken by the Court, said Mr. Justice Lynskey, is that the Minister can only confer power upon himself or his representative under Defence Regulation 58A by order. Unless he exercises his power in that manner he is not able to confer on himself or his representatives any of the powers which he could properly exercise under the Defence Regulation. 'Having exercised his powers and having conferred these duties upon his own officer he cannot by giving instructions which are not orders, limit the interpretation of the Essential Work Order. The result is that, in our view, the National Service Officer has not exercised his discretion. . . . The Minister cannot by instructions limit the duties or limit the discretion of his National Service Officer, but he must carry out his orders as distinct from his instructions.' For

these reasons the notice requiring reinstatement was held to be invalid and the appeal was dismissed.

There is obviously an immense difference between general directions embodied in an Order and mere departmental instructions. The latter are purely domestic; they are usually unknown to persons outside the department; and they are legally unenforceable. Moreover, they may deal either with an individual case or with a class of case; they may be subject to rapid changes resulting from internal or external pressure; and they may be based on expediency rather than principle. An Order, on the contrary, must at least appear to be founded on a principle which the Minister is prepared to justify and defend. It has a higher degree of stability and permanence than departmental instructions, and to that extent is likely to induce a higher sense of responsibility in those who must apply it in particular cases. The decision in *Simms Motor Units, Ltd.* v. *Minister of Labour and National Service* is from any standpoint a decision which should be warmly welcomed by everyone who wishes to see that part of Administrative Law which is concerned with Administrative Justice developed on sound lines of principle and practice. If the Minister of Labour wished to give the recommendations of local Appeal Boards executive force in certain types of case he could have effected that policy by Order. The position would then have been clear to everyone. The best way of doing so would in fact have been to give the Boards power to determine the question and not merely to recommend—but this apparently did not occur to him.

In general, we should approve anything which tends towards the specialisation and segregation of the judicial function within an administrative body, which separates it from the ordinary administrative work, and which enhances the independence of the administrative tribunal.

W. A. Robson.

RECENT PERIODICAL LITERATURE

THE following list cannot pretend to be complete because only those periodicals of which recent copies were available to the writer could be considered.

Jurisprudence. NORMAN S. MARSH: Some Aspects of the German Legal System under National Socialism, 62 L.Q.R. 366; the author maintains, it is conceived rightly, that the wholesale denial and perversion of justice which took place under National Socialism was not due to a new and dominating theory of law, but to governmental interference with the administration of justice. Of this he gives examples such as pressure brought to bear on the Judges, the creation of special Courts with personnel chosen on political grounds, promotion of Judges on political grounds, and, last but not least, the habitual usurpation of the business of the Courts by the Party. GLANVILLE L. WILLIAMS: Language and the Law—V, 62 L.Q.R. 387; Dr. Williams develops the difference between the referential and emotive functions of words and the consequent distinction between statements of fact and value judgments, including its wider implications and the dangers resulting from a failure to draw this distinction. The present article concludes the series and it is to be hoped that the learned author will one day publish the five articles in book form. ROY ST. GEORGE STUBBS: Jeremiah Mason, 24 Can.B.Rev. 678; Mason, who lived from 1768 to 1848, was one of the leading American lawyers of his time. It is strange that he whom Daniel Webster and Rufus Choate considered to be at least their equal should have been so completely neglected and forgotten by posterity. Significance may be attached to the fact that he never held any judicial office, many offers made to him notwithstanding. C. SUMNER LOBINGIER: Precedent in Past and Present Legal Systems, 44 Mich.L.R. 955; the author comes out in favour of *stare decisis*, but advocates the setting up of case law revision committees whose task it would be to keep constant watch over the development of case law and to cut out or recommend the cutting out of dead wood and wrong decisions. The *Columbia Law Review* devotes a complete issue to the memory of the late Chief Justice Harlan F. Stone. Of full-length articles contained in it we may mention: ELLIOTT E. CHEATHAM: Stone on Conflict of Laws, 46 Col.L.R. 719; WALTER GELLHORN: Stone on Administrative Law, 46 Col.L.R. 734; ROSWELL MAGILL: Stone on Taxation,

46 Col.L.R. 747; Herbert Wechsler: Stone and the Constitution, 46 Col.L.R. 764. Louis Nizer: The Art of the Jury Trial, 32 Cornell L.Q. 59; the author reduces the art of advocacy to three essentials, *viz.*, thorough preparation, hard work, and industry. W. H. D. Winder: The Interpretation of Statutes Subject to Case Law, 58 Juridical Review 93; the author's thesis is that judicial decisions on words incorporated in a later statute are no more binding than other decisions, *i.e.*, the meaning of the words may be further developed and the incorporation of a word that has been judicially interpreted in a later statute must not have the effect of 'closing the gate of interpretation'.

Roman Law and Legal History. Artur E. R. Boak: A Fourth Century Petition for Relief from Extortion, 1 Journal of Juristic Papyrology 7. Adolf Berger: Miscellanea Papirologica, 1 J. of Jur.Pap. 13. Rafael Taubenschlag: Customary Law and Custom in the Papyri, 1 J. of Jur.Pap. 41. Hans Julius Wolff: Consensual Contracts in the Papyri, 1 J. of Jur.Pap. 54. Rafael Taubenschlag: Survey of the Literature 1939–1945, 1 J. of Jur.Pap. 79. Rafael Taubenschlag: Survey of Papyri Published 1939–1945, 1 J. of Jur.Pap. 98. Rt. Hon. Lord Cooper: The King *versus* the Court of Session, 58 Juridical Review 83; Lord Cooper relates how King James VI of Scotland (at that time not yet James I of England) attempted to interfere with the work of the Court. In fact, he tried to force the Judges to decide a case in which he had no interest contrary to their better opinion; it was the case of *Bruce* v. *Hamilton*. The Judges stood their ground and the King met with a somewhat humiliating rebuff which did not prevent him from repeating the attempt in a milder form in the English Courts several years later. G. W. Keeton: The Office of Attorney-General, 58 Juridical Review 107; in the present article Professor Keeton describes the history of the office to the time of Francis North, Lord Guildford; we are looking forward to reading the promised continuation. L. M. Minty: Looking in a Dark Room for a Black Hat that Isn't There, 58 Juridical Review 118; the Joyce trial is the occasion for a learned excursion into the history of treason.

Constitutional Law. Marcel Poignard: L'évolution de la Constitution Française, 24 Can.B.R. 664. Joseph D. Block: Suits against Government Officers and the Sovereign Immunity Doctrine, 59 Harv.L.R. 1060; in view of the present discussions about the position of the Crown as a litigant this article is of particular interest. A dilemma arises frequently in the United States in tort actions against Government officers. On the one hand it must not be expressly recognised that it is really the

Government which is being sued because that brings down the bar of the doctrine of sovereign immunity; on the other hand it is clear that what the plaintiff wants protection against is the exercise of governmental functions and not the private conduct of the officer concerned. The Courts have been making considerable use of fictions to extricate themselves from the dilemma and to give an effective remedy; the author suggests that it would be preferable to face the real facts of the case and to relegate the doctrine of sovereign immunity—which bars an action to which it applies—to cases where an action would be a genuine interference with the proper functions of government.

Administrative Law. HARROP A. FREEMAN: Public Utility Depreciation, 32 Cornell L.Q. 4; the author approaches the problem not from the purely legal point of view but from the economic and accountancy angle as well.

Family Law. W. J. BROCKELBANK: The Nature of the Promise to Marry—a Study in Comparative Law (II), 41 Ill.L.R. 199; the author surveys the remedies for breach of the promise to marry afforded in the different jurisdictions of the United States, and, having come to the conclusion that the remedies provided are in some cases too ample and in some insufficient, he makes recommendations for a uniform treatment which he embodies in a model statute. The chief features of it are: (a) the promise to marry is never to be construed as a contract; (b) an action for breach will lie as for the tort of deceit; (c) damages for mental injury to be limited by statute; (d) damages for physical injury (which includes seduction, childbirth, etc.) to be unlimited by statute and to be estimated so as to be equal to the injury suffered; (e) exemplary damages to be prohibited; (f) an account to be taken between the parties so as to restore them to their former position with regard to presents made, costs towards setting up house incurred, etc.; (g) all rights (not the remedies only) to be extinguished after two years. See also the next article.

Law of Property and Revenue Law. D. TOLSTOY: Common Faults of Omission and Commission in Drafting Separation Deeds and Agreements, 11 Conveyancer 10; the article deals with such topics as the possibility of such a document being construed as condonation or connivance in divorce proceedings, variations, the non-molestation clause, maintenance of children, income tax, and stamp duty. DESMOND HEAP: Advertisements and Amenity; the decision in *Mills and Rockleys, Ltd.* v. *Leicester Corporation*, 11 Conveyancer 20; having summarised the judgment, the author points out that

under this decision there is no control over advertisements during a period of interim development before a planning scheme under the Town and Country Planning Act, 1932, comes into operation (when the provisions of section 47 of the Act come into play). E. O. Walford: Caveat Lessor? 11 Conveyancer 27; the article deals with the landlord's liability for nuisance. Oswald A. Hempson and N. Leigh Taylor: Medical Partnerships; notes on the National Health Service Bill as affecting medical partnerships, 11 Conveyancer 41. Arthur M. Smith: Recent Developments in Patent Law, 44 Mich.L.R. 899. José Ignacio Perdomo-Escobar: Aeronautic Servitudes; a comparative study, 44 Mich.L.R. 1013.

Law of Contract. W. J. Brockelbank: The Nature of the Promise to Marry, etc.; see *Family Law.*

Law of Tort. Harry D. Nims: Damages and Accounting Procedure in Unfair Competition Cases, 32 Cornell L.Q. 24; this is the second excerpt from the fourth edition of the author's book on *Unfair Competition and Trade Marks*, which is to be published in the near future. Wex S. Malone: The Formative Era of Contributory Negligence, 41 Ill.L.R. 151; in the earlier part of the nineteenth century, when railway crossing accidents became common, it was found that juries were not well able to deal with them. The Courts, therefore, wished to have a means of controlling the jury, *i.e.*, to take the cases out of their hands. It was found that the issues of causation and negligence were not suitable for the purpose, but that that of contributory negligence lent itself admirably to the desired end. Joseph D. Block: Suits Against Government Officers, etc.; see *Constitutional Law.*

Mercantile Law. Walter Horrwitz: Historical Development of Company Law, 62 L.Q.R. 375; the author shows that there has been, for a long time, a tendency for the shareholders' freedom to decrease and for the requirements as to the information which must be given to the public to become more stringent; he points out that the Cohen Report is in line with the general trend. Kurt H. Nadelmann: The National Bankruptcy Act and the Conflict of Laws, 59 Harv.L.R. 1025; some weaknesses of the Act are shown, and it is contended that if these were remedied so as to improve both the protection of local interests and also international co-operation, other countries might follow suit by carrying out reforms, and a general improvement of co-operation might result. R. W. Jones: Reflections on the Decision in *Wilson and Meeson* v. *Pickering*, 67 Journal of the Institute of Bankers 203. Louis Robertson: Implied Warranties of Non-Infringement, 44 Mich.L.R. 933; is the buyer of goods who is successfully

sued by the owner of a patent which is being infringed by the goods sold, entitled to be indemnified by the seller in the absence of any express provision?

Industrial Law. J. CHARLES SHORT: The Quest for Industrial Peace, 20 Temple L.Q. 28.

Criminal Law and Procedure and Criminology. R. S. WELSH: The Criminal Liability of Corporations, 62 L.Q.R. 345; the author shows that (1) on principle a corporation can be indicted; this holds good in the case of an offence which requires *mens rea.* (2) Whether the criminal act of an agent is the criminal act of the corporation depends on the nature of the charge, the position of the agent, and other relevant acts and circumstances. (3) The offence must be one for which a corporation can properly be indicted; this excludes offences not punishable with a fine and offences which cannot be committed by a corporation, *e.g.*, incest. JULIUS H. MINER: The Jury Problem, 41 Ill.L.R. 183. MICHAEL HAKEEM: Service in the Armed Forces and Criminality, 37 Journal of Criminal Law 120; the author contends that life in the Forces is not conducive to the development of criminal tendencies. RAYMOND CORSINI: A Study of Certain Attitudes of Prison Inmates, 37 J. of Crim.L. 132. VERNON FOX: Intelligence, Race, and Age as Selective Factors in Crime, 37 J. of Crim.L. 141. DORRIS CLARKE: Treatment of the Delinquent Adolescent Girl: by Court or Administrative Tribunal? (Part II), 21 N.Y.Univ.L.Q. 225. L. M. MINTY: Looking in a Dark Room, etc.; see *Legal History.*

Conflict of Laws. KURT H. NADELMANN: The National Bankruptcy Act and the Conflict of Laws; see *Mercantile Law.*

International Law. CLYDE EAGLETON: The Jurisdiction of the Security Council over Disputes, 40 Am.J. of Int.L. 513. I. P. TRAININ: Questions of Guerilla Warfare in the Law of War, 40 Am.J. of Int.L. 534. LESTER NURICK and ROGER W. BARRETT: Legality of Guerilla Forces under the Laws of War, 40 Am.J. of Int.L. 563. DANIEL H. LEW: Manchurian Booty and International Law, 40 Am.J. of Int. L. 584. GUSTAV POLLACZEK: The United Nations and Specialised Agencies, 40 Am.J. of Int.L. 592; the article deals with international co-operation in the social and economic fields. HANS KELSEN: Organisation and Procedure of the Security Council of the United Nations, 59 Harv.L.R. 1087. HON. ROBERT H. JACKSON: Closing Arguments for Conviction of Nazi War Criminals, 20 Temple L.Q. 85. JOSÉ IGNACIO PERDOMO-ESCOBAR: Aeronautic Servitudes, etc.; see *Law of Property.*

W. A. STEINER.

REVIEWS

A Text-book of Jurisprudence. By G. W. Paton. (Geoffrey Cumberlege, Oxford University Press. 1946. x and 528 pp. 21s.)

A modest enough title for what will be to many students *the* text-book of jurisprudence; for the publication of Professor Paton's book is in the nature of an event. It may be, as in the case of Paton's renowned predecessor in this field, Sir John Salmond, that one must go to the Antipodes in order to obtain a true perspective of the common law, and then reimport into England a deeper insight into that system than we here usually obtain. But be that as it may, here is a new book which adds something of real, and all too rare, value to the short list of students' books on jurisprudence.

The author arranges his work in five parts: I, Jurisprudence, Law and the State; II, Sources; III, The Technique of the Law; IV, The Analysis of Legal Concepts, and V, Analysis of Law on the Basis of Interests. The scope and selection of his subjects follows the sound common law principle of experience rather than logic—experience in leading students through the labyrinth of juristic thought.

Professor Paton immediately takes his readers into a discussion and criticism of some of the most important schools of legal theory. His treatment of Kelsen, for instance, is remarkably concise and uncommonly understandable. He gives an unusually clear exposition of the theories of Roscoe Pound, a matter which is not always easy, since so much of Pound's theories are recorded in the lecture notes of his students and so little in the printed word. The influence of this great American lawyer is obvious, as the author acknowledges, throughout the whole of this book; but writing of the End of Law his statement that, ' Pound's generalisations touch only the fringe of the problem ' (p. 100) is less than an understatement—it is an injustice. In passing, one might remark that there is good authority in English law for the term ' End of Law ' to describe the object or purpose of law, but it is, nevertheless, a most unsatisfactory term from the point of view of the student, quite apart from the fact that it raises in him false hopes at an early stage in his career.

The author's chapter on ' Juristic Writings and Professional Opinion ' is very good. He seems less at ease in dealing with Law and the State. Here legal and political theory meet, and matters of opinion become as important as matters of fact.

It is very questionable, for example, if taken to the extreme, whether ' we can best secure the effective protection of the subject . . . by dividing political control among as many groups in the community as possible ' (p. 138). Professor Paton does not seem at all convinced of the legal nature of international law. While he accepts Kelsen's contention that ' A legal order may be created in the international sphere even though no super State is set up ' (p. 139), a matter which raises immediately the question of the legal nature of international law, he claims (p. 71) that international law can hardly be described as law, but whether it may be so called is a question of fact. The War Crimes trials which have been held in Germany recently, as well as the system of an International Court which one hopes soon to see in a new and stronger form, may provide facts of sufficient weight to tip the balance in favour of calling international law a legal system in fact as well as in hope.

In protesting against the author's definition of a right, in which he adopts the meaning of the Shorter Oxford English Dictionary, namely, ' The standard of permitted and forbidden action within a certain sphere ', one is skating over ice which many before have found too thin. But one can at least say that the essence of a right is something which one is permitted, not forbidden, to do; and in any case it is hard to see how anything could be permitted and forbidden at the same time. And on this question of words, where, Professor Paton, did you find the word ' externalize ' ?

The author's chapter on ' Titles, Acts and Events ' is well written and shows careful analysis. The illustrations remind one of Ihering's *Law in Daily Life*. One of the most interesting parts of the book is the author's analysis of legal concepts. It is not common to find such a treatment of Status, for example, as that given in this book; but the author could, with great profit to students, expand this section of the book, since the subject is becoming of greater importance in the increasingly complex industrial organisation of today. Professor Paton, however, misses one or two very important points on Status; for instance, the social or public nature of Status is fundamental to the concept; significantly following from the above, in some cases it can only be acquired or discarded by an act of the State, while in all remaining cases if the acquisition or abandonment of a status follows from a voluntary act of the party subject to it, such an act of the parties will affect only the beginning or the ending of the status, but never both. This is a feature which distinguishes true legal status from, *e.g.*, professional privileges or disabilities. Austin already found the purpose of Status as being a convenient method for

classifying personal relationships: there are several less specious reasons for its existence, and one may hope that the author in future editions of his book will advert to some of them. It is satisfactory to find that the author bases his theory of the nature of corporate personality on the firm ground of reality.

The chapter on 'Rights Directly Created by Law' is a pleasure to read, the section on 'Standards of Care and Abuse of Rights' being notably good. If, in England, too much has been said about the former, too little has certainly been said about the latter; and it is fitting that the attention of English students should be drawn to the question of abuse of rights by a jurist with knowledge of the common law in America and experience of it in England and the Dominions.

Book V, on 'The Analysis of Law on the Basis of Interests', should not, it is thought, have been included in this work. It is not only incomplete in, for instance, failing to deal with social interests, but in quality falls below the high standard of the rest of the book. From the point of view of the student, it may tend to be confusing, as it goes very quickly on the basis of interests over ground already covered at length on the functional and analytical bases. On the other hand, somewhat expanded, it would make a very good separate volume; and in case this is ever contemplated, attention is drawn to the statement (p. 468) that 'the sale of public offices is naturally an offence' (*Harrington* v. *Du-Chatel*, 1781), and the author is referred to the *Times* newspaper of December 17, 1792,[1] not in contradiction, but merely in qualification of his statement.

Throughout the whole of his work the author maintains a most interesting and stimulating style of writing. He has taken to heart Dr. Allen's warning that a text-book of jurisprudence may become a treatise 'in which the subjects are dully classified', and lives up to his declared endeavour 'to avoid using the traditional and imposing quadrisyllables which give a superficial impression of learning'. The author's method is comparative; his references to German and French law in particular add great value to the work. On the other hand, it may be thought that his references to Roman law are somewhat overdone and may tend to give the student an exaggerated view of the influence of Roman law on the common law. This feature appears particularly in Professor Paton's chapter on the subject of 'Property', in which common law

[1] 'Wanted by a Gentleman of Character and Respectability, a Situation under Government, from 200 l. to 400 l. a year, for which an adequate premium is ready to be advanced. Any person holding such an employ, and willing to resign, will be honourably treated with by the Advertiser, whose interest may be found sufficient to effect a resignation.

Address to S.S. Navy Coffee House, Newcastle Street, Strand.'

rules are dealt with under such un-common law headings as '*Res mancipi et nec mancipi*' (p. 382) and '*Jus in re aliena*' (p. 393).

Rarely has this subject been presented in so readable a form and with such satisfactory scope. One may hope that Professor Paton's book will achieve among lawyers and would-be lawyers the wide acceptance which it richly deserves.

R. H. GRAVESON.

THE COLLECTED PAPERS OF JOHN BASSETT MOORE, IN SEVEN VOLUMES. Published for the Trustees of the JOHN BASSETT MOORE FUND by the Yale University Press, 1944. (London: Humphrey Milford, Oxford University Press. 1945. £6 13s. 6d. net.)

IT would be as presumptuous to offer an estimate of the contribution that this great American scholar of the law of nations has made to his chosen subject as it would be to try and estimate that of his nation. Mr. Moore belongs to that remarkable band of North American international lawyer-statesmen, distinguished alike for their scholarship and their active part in affairs, which flourished during the last quarter of the last century and the first quarter of this and whose work during that time may well cause future generations to look back on it as the Silver Age in the United States. Not, perhaps, of the same stature as a statesman as Elihu Root, nor so passionate an internationalist as James Brown Scott or as Nicholas Murray Butler (who, like Mr. Moore, is happily still with us), John Bassett Moore may fairly be classed as the greatest scholar among them. It is, therefore, fitting that some at least of his many papers, published over a space of no less than 66 years, should be assembled in a single collection, to stand beside the multivoluminous *History and Digest of International Arbitrations*, *Digest of International Law* and *International Adjudications*, which also bear his name. It is perhaps salutary, too, that this great collection should appear at this time. For in the contemporary crisis of European culture it is to be expected that eyes will be turned for consolation and encouragement towards the United States. And, in so far as the sphere of legal studies is concerned, the westward-looking eye is bewildered by the spectacle of a literature appearing to consist virtually exclusively of case books and doctoral theses, and of reviews principally devoted to topics of administrative and tax law. Thus it is a reassurance and a relief to see, standing up from this somewhat monochrome and uninspired landscape, such a monument as the scholarship of Mr. Moore represents, the dimensions and detail of which

receive emphasis and due accent from the making of this collection. Its perception thus enabled recalls to the mind the towering structures of American legal scholarship raised by such men as Holmes and Ames, Williston and Wigmore, which yet stand in the receding foreground, not marring but rather matching the lofty, distant architecture of Kent and Story.

That in the past decade and a half the battlements of American academic legal science should have come to resemble Ossian's walls of Balclutha is due, it would seem, to the attraction administrative, and to a lesser extent judicial, office has exerted upon their garrisons during the period of the New Deal. A foreigner cannot presume to doubt that the decision of many to exchange chairs or the prospect of them for a more intimate concern with the affairs of the nation at a turning-point in its governmental history was timely and essential. Its result has been indisputably the government's gain—and thus in a sense that of the contemporary community. But it is, it may be hazarded, a matter for consideration as to how far it has not been to a corresponding extent the universities' loss, and therefore indirectly that also of posterity. Certainly the drift away from the schools to the civil service has been in direct contrast to the trend in English affairs—the exceptional and temporary phenomena of wartime apart. And it is a tenable view that the great age of the American law schools is past, or is rapidly ending. Such a view deserves indeed no more credit than any other discernment of distinct epochs in the relentless infinity of time. Any moral it would point is, too, to be received in the knowledge of three other considerations. The first of these is the general one that there has been amply proved to be no necessary inhibition upon academic study resulting from incumbency of governmental office. The second is that the mutual relations of the law schools, the legal profession and the civil service are in the United States of a markedly individual character and certainly very different from those which obtain in England. The third is that one half of legal science is the science of public law, the advanced school of which must inevitably be the public service.

The operation of these compensating factors is well illustrated by the career of John Bassett Moore. Mr. Moore was a participant in an earlier *Drang nach* Washington, being one of the four successful candidates in the first examination for entry into the Department of State held by the National Civil Service Commission set up in 1885. In the Department he remained until 1891, when he became Professor of International Law and Diplomacy at Columbia University. But in a sense he never left Washington. For, at President McKinley's request, he took office as Assistant-Secretary of State on the eve of the Spanish-American War, as he did again, this time as

counsellor of the Department with power to act as Secretary of State, shortly before the outbreak of the First World War. And throughout his long career he acted continually as Agent, Commissioner, or Plenipotentiary of the United States in matters of international legal concern. His record of public service, within which his seven years' service as Judge of the Permanent Court of International Justice and his 26 years' membership of the Permanent Court of Arbitration must also be reckoned, was thus a very full one. Yet, in the intervals of it, Columbia knew him constantly until his retirement in 1924. And his production of publications throughout its length was nothing short of prodigious. Nor was it achieved by what the late Mr. Justice Cardozo termed ' the method agglutinative and tonsorial '—scissors and paste. On the contrary it was, as the collection under review reveals, of exceptionally high and consistent quality. His main works are, of course, the three great studies in the fields of arbitration, international adjudication and international law generally to which reference has already been made. Besides these he published notable studies on extradition and related topics (*Report on the Cutting Case*, (1887), *Report on Extradition* (1890), *A Treatise on Extradition and Interstate Rendition* (1891)), an American companion to Dicey's *Conflict of Laws* (1896), two studies of American diplomacy (*American Diplomacy, Its Spirit and Achievements* (1905), *The Principles of American Diplomacy* (1918)), a short constitutional study (*Four Phases of American Development* (1912)), and a notable volume of essays (*International Law and Some Current Illusions* (1924)). There are reprinted in the present collection the *Principles of American Diplomacy* (Vol. IV) and the ' Current Illusions ' (Vol. VI). Besides these it contains five papers previously unpublished: ' Speech at Felton, July 4, 1877 (Vol. I, p. 1), ' Mediation in the Boundary Dispute between Honduras and Nicaragua ' (Vol. V, p. 118), ' American Research Historical Fund ' (Vol. VI, p. 287), ' Far Eastern Policy ' (Vol. VII, p. 6) and ' Peace, Law and Hysteria ' (Vol. VII, p. 220), the last, written in 1943, extending to 110 pages.

The list of the previously unpublished papers alone might give rise to the suspicion that the collection contains nothing but miscellaneous matter. That suspicion might be thought confirmed when it is added that there are reprinted in it no less than 124 book reviews (out of a total of 343 items collected) occupying approximately 160 pages (or roughly half a volume). Dismiss these as *ephemera* and take out also the addresses of welcome and such-like (which are also numerous) and, it may be asked, what remains? Doubtless the collected works of every man contain too much, but here the proportion of the superfluous is certainly extreme. Judicious editing could

surely have reduced the total bulk by a half and have helped rather than hindered Mr. Moore's renown. Still, it is not to be denied that even the book reviews reveal the whole man in a way which is quite remarkable. Possibly the July 4 oration, delivered in Mr. Moore's eighteenth year, is too charming a *juvenilium* to perish but the insurance ' sales-talk ' —Mr. Moore is a director of the Equitable Life Assurance Society—at Volume VI, p. 322, deserves oblivion. The rest is very often of high interest and value. Thus, reverting to the reviews, we may discern behind them a mind of great precision and critical capacity. Not even Satow was spared the logic of Mr. Moore's learning (cf. Vol. V, p. 24 ff.), nor yet Professor Hyde (*ibid.*, p. 356 ff., esp. p. 359). Typical of his style as a reviewer is the following: ' Of the British members of the joint High Commission by which the Treaty of May 8, 1871, was formulated, it is said that . . . the chairman was Earl de Grey, and with him were Goderich, President of the Privy Council ', etc. But, if Viscount Goderich was present, so also were the Earl of Ripon and Baron Grantham, neither of whom the author mentions. In fact, all three were titles belonging to Earl de Grey, who, nevertheless, acted in a single individual capacity ' (Vol. IV, p. 233). Or this: ' In a play once much in vogue with the votaries of the comic stage . . . the leading roles were borne by two rival singers, who, with a view to exhibit their respective merits, alternately assailed with ever-rising inflection the auditory nerves of their unfortunate fellows. . . . The reviewer trusts that he may not be suspected of harbouring vocal ambitions if he admits that almost a generation ago, in 1891, he did publish a treatise in two volumes entitled, as he dimly recalls it, not " International Extradition and Interstate Rendition " but " Extradition and Interstate Rendition " . . . in this work, which has happily proved to be a fecund source of even unconscious inspiration and succour to subsequent writers, he ventured, not diffidently, but with full, aggressive confidence. . . to introduce into the law the distinctive terminology again unfurled to the world by the present author ' (Vol. V, p. 32). In the face of such pointed accuracy it is almost with delight that one discovers the great man himself referring to Lord Charles Beresford as *Lord* Beresford (Vol. II, p. 242).

The extracts quoted perhaps by themselves reveal what is the fact—that Mr. Moore is a stylist and a highly sensitive one. It is not without significance that his first published paper was on ' The Relation of Literature to National Life ' (Vol. I, p. 4). His early interest in methods of expression is apparent from his foreword to Wharton's *Diplomatic Correspondence of the American Revolution*, published in 1889, where he writes of his fellow master in the art of digesting: ' It is a distinctive feature

of Dr. Wharton's books that, in addition to their convenience and authority as works of reference, they possess a peculiar literary charm. His tendency was to be diffuse rather than concise. . . . Occasionally his sentences are somewhat involved and complex in construction. . . . They give the impression of having been thrown out fresh from the writer's mind in the vividness and energy of rapid composition' (Vol. I, pp. 58–59). Mr. Moore's own first production—the speech made at the age of seventeen—is pregnant with literary aspiration and liberally sprinkled with such patches of fading purple as the description of 'despotism sitting red-handed on the throne in the fairest capitals of Europe' (vol. I, p. 1). He tried his hand at verse —somewhat unsuccessfully if we may be permitted to judge from his 'Decline of Sentiment' (1885) (Vol. I, p. 23). But apparently he was not discouraged, for an ode to his patron, Thomas Francis Bayard, appears as late as 1907 (Vol. III, p. 288). He has kept always an eye for a fine phrase—such as Coke's description of Christ as 'Chief justice of the whole world', or Hall's 'circle of law-governed nations'. And he soon developed an easy, concise and accurate style, much enlivened by a certain irony. The present reviewer has since he was an undergraduate cherished one example of this irony in the 'Current Illusions' (reprinted here at Vol. VI, p. 31): '. . . Lord Salisbury, who, although somewhat of a recluse, must have known of the existence of steam railways in 1900 . . .'. He can now match it with another—Mr. Moore's description of his incredulity on first hearing of the Russian fleet's engagement with the North Sea trawlers: '. . . I suggested that men of the sea, and especially fishermen, had always had the benefit in the public mind of a certain indulgence on account of their susceptibility to optical illusions . . .' (Vol. II, p. 193). His easy learning has sometimes betrayed Mr. Moore into pomposity, as in the phrase 'in spite of uninformed statements to the contrary (Bayard) was the first diplomatic agent of the United States to hold the rank and title of Ambassador' (Vol. III, p. 431). And his reproofs of inaccuracy are, as has been demonstrated, often sharp to the point of being wounding. Perhaps the only really unbarbed review is that of Professor Ziegler's study of the international legal learning of Chief Justice Marshall (Vol. VII, p. 196), Mr. Moore's chief hero whose recommendation of the exercise of a 'cold, critical faculty' in the exposition of the law seems much to have appealed to him (Vol. V, p. 356). But on the whole, Mr. Moore writes in an appealing and dignified fashion. It is only in his own State—he is a loyal Delawarean, and the high school of his native Smyrna was in 1936 named after him (Vol. VII, p. 66)—that he sometimes indulges in rustic high jinks which, to make a phrase which has at least

contemporary meaning, are positively presidential (cf. Vol. III, pp. 108–110; Vol. VII, pp. 67–68).

In spite of his severity, Mr. Moore reveals himself as a remarkably fair-minded man. It might have been expected that his vivid sense of history, his long official service, and his lifelong devotion to the task of expounding ' American ' international law might have infected him with a certain bias. But that is not so, and in few places other than his writings can there be collected a clearer refutation of the familiar charge that international lawyers tend to be unduly subservient to the official attitudes of their own governments. Mr. Moore's own appreciation of the limitations of the ' nation-by-nation ' method of study of international law was early apparent (cf. review of Nys, *Notes pour servir à l'histoire littéraire et dogmatique du droit international en Angleterre* (1888) (Vol. I, p. 78)). He has been ever quick to correct any overestimation of American influence upon that law and to emphasise, for instance, that ' in fact, some of the profoundest treatises on international law—treatises as much beyond the comprehension of the amateur as *Coke on Littleton* or *Fearne on Contingent Remainders*—antedate the American revolution ', and that arbitration ' was much employed even among the Greeks, to say nothing of the scores of cases in the five centuries preceding the birth of the United States ' (Vol. IV, p. 231). He will not suffer Hay to be placed equal with Franklin or John Quincy Adams as a statesman (*ibid.*, p. 235). But nowhere does his impartiality and his exquisite sense of proportion appear to greater effect than in his treatment of Anglo-American relations. Despite his juvenile conception of Europe at the time of the Revolution to which allusion has been made, he was among the first to deplore the traditional American attribution to King George III of the horrid epitaph earned by one of his Royal progenitors:

> ' Foul as it is, hell itself is defiled by the fouler presence of John '.

And his contemporary account of the British case in the Venezuela boundary dispute and the relation of that dispute to the Monroe Doctrine was exceptionally judicious and fair (cf. Vol. II, p. 84 ff.). Indeed, if there be one outstanding quality to be discerned in his mind and personality, it is his luminous sense of proportion, especially of historical proportion. It was this deep consciousness of history and the relation of the present to history which led him, in the celebrated ' Current Illusions ', to seek to refute the various inroads made during the First World War on the ancient distinction between combatants and noncombatants. In Mr. Moore's view, there was no justification for the tendency to abandon the distinction between absolute and conditional contraband

on the ground that modern war is total in the sense that entire nations are mobilised for its conduct. For it ignored the growth of populations since the time of the Napoleonic Wars and regarded only the absolute increase in the size of military forces. Thus, whilst indeed six times as many Englishmen were killed on the first day of the Battle of the Somme as Marlborough at any one time commanded, no greater proportional national effort was represented by the armies of Haig than by those of the Duke. If, therefore, the clear line between army and nation was tenable in the time of the one, so also should it be in that of the other (cf. Vol. VI, p. 1 ff.). The cogency of this argument, it may be mentioned, is perhaps illustrated by one aspect of the latest and greatest conflict. For during the late war the Government of the United Kingdom proposed to divert one half of the national income to war purposes. This, naturally, seemed an unprecedented and a revolutionary undertaking. Yet Pitt and his successors, who waged war for over twenty years, took as its tithe no less than one quarter of the nation's monetary harvest. The argument is one to which Mr. Moore returns again and again (cf. Vol. VI, p. 283; Vol. VII, pp. 116, 170 ff.). But it is not the only connection in which he urges the essential stability and lack of change in the condition of men and nations. For instance, for him the depression following the collapse of the year 1929 suggests nothing more than a parallel with the period following the Civil War and the panics of 1837 and 1873 (Vol. VII, p. 74).

It would not be possible to give here an account of the contents of these seven volumes which was anything like complete. For they contain the less lengthy writings of a man who has enjoyed an exceptionally long professional career and who has had to an exceptional extent the *cacoethes scribendi*. Not unnaturally, the topic with which Mr. Moore's name is automatically linked—arbitration—figures with some prominence. The Permanent Court, likewise, has a large place. Recognition is also a favourite topic with him. And legal and diplomatic biography seems to have been his chief pastime, as studies of Marshall, Story, Lincoln, Washington, Hamilton Fish, Franklin, Hay, Bayard, Bolivar and Kossuth bear ample witness. In all it is a fascinating collection, a veritable monument of learning, marred only by a complete lack of editing.

CLIVE PARRY.

THE MEDIEVAL IDEA OF LAW AS REPRESENTED BY LUCAS DE PENNA. By WALTER ULLMANN, with an Introduction by HAROLD DEXTER HAZELTINE. (London: Methuen & Co., Ltd. 1946. xxxix and 220 pp. 20s. net.)

THIS book hardly needs a review, for Professor Hazeltine has really provided an authoritative one in his Introduction, which serves both to explain the general problems involved and to place Dr. Ullmann's special contribution towards their solution. It is also a guarantee of the author's scholarship, already demonstrated by a number of lesser essays on medieval law. There is more about Lucas de Penna (*circ.* 1320–90), and less about medieval law in general than the title might lead us to expect, but he is peculiarly interesting. Though he falls under the general heading of the Post-Glossators, he was a man of unusually wide general learning, of independent mind, and, unlike most of the others, apparently never engaged in teaching. He has also been studied less than some others, in particular his most famous contemporary, Bartolus. He was undoubtedly much occupied in practice in the Sicilian Kingdom, but his chief work was undertaken, he tells us, during a period of enforced inactivity due to illness, and, though it is called a commentary on the Tres Libri (*i.e.*, the last three books of Justinian's Code) it is in fact far more, containing as it does, the full statement of a ripe scholar's whole attitude towards law. It has had a curious history. Though well known to Neapolitan scholars, it did not become popular further afield until the sixteenth century, and the first edition dates only from 1509. In part this late influence is due to the accident that doubts were cast—probably wrongly—on the authority of Bartolus' work on the Tres Libri, but it is also true—and this is one of the most interesting points brought out by Dr. Ullmann—that Lucas anticipated in a marked degree the absolutist tendencies of the post-Reformation period. Bodin thought highly of him, and Dr. Ullmann points out that he was at one with Bodin in his contempt of the multitude and his refusal to attribute the powers of the ruler to anything but divine authority in spite of all arguments to be drawn from the *lex regia*. For the later extravagances of the divine rights attached particularly to hereditary monarchs he cannot be held responsible. Lucas is also remarkable for the extreme views which he held on the independence of the secular power, though the contrast between him and Bartolus is perhaps exaggerated by Dr. Ullmann where he deals expressly with the subject (p. 172). It is true that Bartolus' words are frequently on the Papal side, but there is good reason, as Dr. Ullmann well knows (p. 91), to believe that he wrote thus only because of his presence in territory ' friendly

to the Church', and his real opinions probably differed little from those of Lucas. Lucas' views, however, on the validity of the civil, as opposed to the canon law, were certainly more far-reaching than those of Bartolus. Learned though he was in the canon law—perhaps Dr. Ullman over-emphasises his superiority to contemporary legists in this respect—and great as was his respect for the Church, he would have no truck with Bartolus' territorial limitations on the application of the civil law, which, he asserts further, is valid even in an Ecclesiastical Court where temporal causes of ecclesiastics or spiritual causes of laymen are concerned, unless openly contrary to the canons or the liberty of the Church. Particularly notable, too, is his championship of the (Roman) civil law in the Sicilian Courts. Frederick II had laid down that, in the absence of relevant enactments or customs, judgment was to be given *secundum iura communia, Langobarda videlicet et Romana.* Nevertheless, by arguments that are hardly ingenuous, Lucas overruled the preference apparently given to the Lombard law and enthroned that of Rome, at a time, it must be remembered, when 'reception' was far from complete. Such questions, mostly treated under the heading 'Application of Law', happen to interest the reviewer most, but there is much else —philosophical discussion, conceptions of crime, and some important remarks on Lucas' attitude towards war and peace, which show that here, too, he foreshadowed the sixteenth century and particularly Gentilis, Nor is this perhaps so surprising seeing that Gentilis proclaimed himself an adherent of the Bartolist against the newer Humanist school of law, as we have been reminded recently (not counting the war years) by Astuti's edition of his *De Juris Interpretibus Dialogi Sex* (1937). In writing on a Post-Glossator, Dr. Ullmann has added his voice to the growing vindication of this school against the strictures that were formerly fashionable, but he has done so in an original manner and in a book which makes a most valuable contribution to the history of legal thought.

H. F. J.

THE PRINCIPLES OF TOWN PLANNING LAW. By J. CHARLESWORTH, LL.D. (London: Stevens. 1946. xii and 164 pp. 10s. 6d. net.)

ALTHOUGH as Sir Patrick Abercrombie has shown in the interesting historical introduction to his little volume on town planning, the science is quite a venerable one, the law relating to it is one of the youngest members of the legal family. Early examples of town planning resulted from the accidents of military necessity, as in towns planned like the Roman *castra*

to meet the requirements of war, or large-scale development carried through under a single architect or group of architects as with Bath, or Nash's London, or finally, similar development by the far-sighted owners of large estates, to whom Dr. Charlesworth refers sympathetically in the first chapter of this volume as the benefactors to whom we owe much of such grace as there is in modern England.

As the large estates became more and more broken up, the sporadic development which was such a marked feature of Victorian England became almost universal, and the more far-sighted architects and social philosophers perceived that without some sort of compulsory pattern for future development there would shortly be complete chaos over most of the country. And thus, over a hundred years too late, we got the ineffectual sections of the Housing and Town Planning Act, 1909. Since then no branch of our law has developed more rapidly, and although few would claim that it is a perfect instrument for the purpose, the Town and Country Planning Act, 1944, does provide machinery which in the hands of a strong and energetic Minister (and though he is the junior in the hierarchy of the Government, few would deny that his responsibilities are among the most important in the modern set-up) can be made radically to influence for the better the future appearance of England. This new branch of the law is therefore of outstanding importance in the social recasting of the country, and since it more and more grips all owners of land and houses a good grasp of its main essentials has become an essential part of the equipment of the great majority of working lawyers.

Unfortunately, like most branches of administrative law, it is exceedingly complex and detailed, difficult indeed for the average student to master. Dr. Charlesworth, who first made a legal literary reputation with exceptionally lucid elementary expositions of mercantile law and of company law, has now essayed and in large measure achieved a similar object in this volume. It is intended for students and also for those practitioners who merely require an introduction, and it can be confidently recommended.

His book consists largely of an exposition of the 1944 Act and the Ministerial orders made thereunder, in the light of the explanatory memoranda, and in the light of such decisions as have been given by the Courts. It is interesting to notice how helpful on the whole the judicial decisions have been and how difficult it is to build up an intelligible jurisprudence in a new branch of the law of great complexity without such decisions. Which all goes further to emphasise the unfortunate character of the gulf which has grown up during the past generation

between Whitehall and the Courts, and to underline the importance of an early implementation of the recommendations in the Donoughmore Report for the setting up of a new section of the judiciary specially charged with the application of administrative law.

Dr. Charlesworth takes a reasonably wide view of his subject, discussing, for example, the regulation of advertising and the ribbon development of highways which are dealt with in special statutes. He also has a chapter on those aspects of the housing Acts which are specially connected with planning.

While here and there one may disagree with Dr. Charlesworth's estimates on practical points, *e.g.*, when he states that the check placed upon planning control by the need to pay compensation has not been serious, there is seldom or never any reason for substantial disagreement with his exposition of the law. Moreover, the clarity of this, even when the subject is at its most intricate, as when concerned with interim development, and the contents of schemes, lives up to the high standard set in his earlier works. There is perhaps one slight lapse in Chapter II, where it is only made clear by inference that the 'interim period' now commences automatically under section 1 of the 1943 Act.

C.

RATING VALUATION PRACTICE. By P. R. BEAN and A. LOCKWOOD. Foreword by HAROLD B. WILLIAMS, LL.D. (London: Stevens. 1946. xvii and 211 (index) 7 pp. 21s. net.)

THOUGH this book is written primarily for Rating and Valuation Officers, by whose Association it is recommended, the practising lawyer who has not a *Ryde on Rating* by him will find it a useful work of reference since some 180 reported cases are dealt with and the general legal problems involved are adequately discussed. The writers, from the legal aspect, draw heavily on Scott L.J.'s judgment in *Robinson Bros. Ltd.* v. *Durham, etc., Assessment Committee*, [1938] A.C. 321, and in this regard it is unfortunate that the authors have tended to overlook the lawyer's need by their too frequent references to reports in *The Rating and Income Tax Journal* in preference to those in the more usual series; it might be considered worth while, in the next edition to which we may well look forward, quoting both types of reports, at any rate in the Table of Cases.

The chapters relating to the Basis of Assessment, Exemption from Rating, Methods of Assessment and the

Valuation List should prove useful for the lawyer who does not require to delve deeply into the subject. The remainder of the book deals with the problem of valuing various types of property and is well illustrated with practical examples ranging from weekly-let property to electricity undertakings.

A. Farnsworth.

The Law of Income Tax. By E. M. Konstam, K.C. Tenth edition. (London: Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1946. lxviii and 802 and (index) 48 pp. £3 10s. net.)

The task of a writer upon the law of income tax is, indeed, unenviable. Although the statute law since the reimposition of the income tax in 1842 had been consolidated—but not codified—by the Income Tax Act, 1918, no fewer than thirty-two Acts dealing with income tax have become law in the last twenty-eight years; each of them has amended, or extended, the consolidated law in greater or less degree. The provisions of these Acts, save those which relate specially to administration, are embodied by Mr. Konstam in an appendix extending to over three hundred and fifty pages; the main body of the work is linked up with this appendix by means of brief footnotes. In addition a vast body of judicial interpretation has developed around these statutes, expository both of the principles inherent in the scheme of the Acts and of the underlying meaning of words and phrases therein, all too often couched in most involved form. In 1936 the reported cases dealing with the statutory law exceeded eighteen hundred and their number has increased continuously each year since, as may be seen from the table of cases which covers no fewer than forty-one closely printed pages.

Mr. Konstam's work has already attained the status of a classic upon the complex subject of income tax law, but an attempt will be made here, for those who have not hitherto 'enjoyed' it, to give an idea of its general layout. The occasion of a first review in these pages of this truly monumental work is, perhaps, hardly proper for any detailed criticism of what might be considered only minor points.

Mr. Konstam has summarised, in a continuous and self-contained account of over four hundred pages, the unwieldy mass of legislation and case-law referred to above; the citations of cases are set out in footnotes, often shrewdly annotated by the author.

After an opening chapter in which the underlying scheme of the Income Tax Acts is dealt with and the personal reliefs to which the taxpayer is entitled are considered, Mr. Konstam

proceeds to deal with, in separate chapters, the sources of income chargeable under the five famous Schedules, A, B, C, D and E. In the chapter (No. 2) relating to 'Income from Property in Land', he properly includes the code by which 'Excess Rents' are assessed though the charge is in fact made under Case VI of Schedule D; see sections 13–17, Finance Act, 1940. No fewer than five chapters are devoted to income chargeable under the six Cases of Schedule D. Chapters 5 and 6 are especially interesting for in them the author covers the whole field of liability in respect of Trades, etc., dealing both with the circumstances in which a charge can arise, those receipts which can be considered to be of a 'revenue' nature and, lastly, the question of what deductions can or cannot be made from gross receipts.

The provisions of the Income Tax Act, 1945, which has made a breach in the century-old scheme of income taxation by its allowance for 'capital expenditure'—see note at 8 MOD. L.REV. 243—are dealt with in a separate chapter (No. 7) entitled 'The New Allowances'. Particular praise for their clarity of expression must be given to the chapters (Nos. 14 and 15) relating to 'Total Income' and 'Surtax', especially when regard is had to the involved, and at times barely intelligible, language in which the relevant statutory provisions are couched. The law relating to 'Charities' is admirably set out in a concise chapter (No. 13) while the remaining chapters deal with 'Persons liable to be assessed', 'Returns and Penalties' and the machinery and law of the assessment and collection of the tax and the taxpayer's right of appeal and other remedies open to him.

Mr. Konstam's layout of his subject seems, to your reviewer, impeccable save his treatment of 'Residence'. As regards the *individual*, the statutory and case-law is to be found in part under 'Income from Foreign Possessions etc.' (pp. 218–22) and in part under 'Persons liable to be assessed' (pp. 265–8) while the residence of *companies* is dealt with in chapter 5, 'Trades and Professions, Cases 1 and 2' (pp. 79–88) under the sub-heading 'Head, Seat and Directing Power'. It is suggested that it would have been preferable to have devoted a separate chapter to 'Residence', dealing both with individuals and companies and embodying therein the allied topics of 'Domicil' and 'Ordinary Residence'. Although Mr. Konstam has analysed, with considerable acuteness, the criteria which determine whether or not a company can be regarded as resident in this country, this analysis seems rather out of place in a section dealing with 'the place where a trade is carried on'; more especially since in the two most recent leading cases on this subject—*Swedish Central Railway Co., Ltd.* v. *Thompson*, [1925] A.C. 495, and *Egyptian Delta Land*

and Investment Co., Ltd. v. *Todd*, [1929] A.C. 1—neither of the appellant companies was ' carrying on a trade ' within the meaning of the Income Tax Acts, their only chargeable source of income being securities and possessions situate abroad and assessable under Cases IV and V of Schedule D. The author's treatment of this subject might well be expanded if a separate chapter could be devoted to it and this would enable him to give more consideration to the decisions in *Levene* v. *Inland Revenue*, [1928] A.C. 217 and *Inland Revenue* v. *Lysaght*, [1928] A.C. 234, in which is epitomised the position where an individual has no place of permanent abode, to use a neutral term, in this country.

In chapter 18, which deals with ' Appeals, etc.' the section headed ' What is a Question of Law? ' (pp. 387–9) might well be lengthened so as to bring out more clearly those general principles by which the Courts have distinguished ' questions of law ' from ' questions of fact '—see, in this regard, the article at 62 L. Q. R. 248–265 on ' Fact or Law in Cases stated under the Income Tax Acts '.

This work stands out pre-eminent among lawyers' text-books upon the abstruse subject of income tax, not only by reason of its high standard of accuracy but also because of its readability and of the skill of the author in condensing into understandable language the most involved statutory provisions. No practitioner engaged in revenue law should be without this work though this recommendation seems almost superfluous when one recollects that no fewer than ten editions have been called for in the space of twenty-five years.

A. FARNSWORTH